IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 198

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SUPREME COURT, U.S.

NO. 79-6514

SAWYER LEWIS,

Petitioner

V.

THE LOUISIANA STATE PENITENTIARY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner, Sawyer Lewis, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1980.

OPINIONS BELOW

The opinions of the Court of Appeals, the Federal District Court, and the Louisiana Supreme Court are not reported and appear in the Appendix hereto. On August 16, 1977, Appellant's Writ of Habeas Corpus was denied before the trial judge, but no written opinion was issued by him.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 4, 1980, and this petition for certiorari was filed by May 4, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether a defendant is denied a substantial defense where his retained counsel failed to file a motion to suppress illegally obtained evidence or to object timely to the introduction of illegally obtained evidence, which was the only evidence presented against the defendant that resulted in a life sentence without benefit of parole? Said another way, is a defendant deprived of any constitutional right under the Sixth and Fourteenth Amendments when his lawyer fails to use the only defense available to him which not only results in life imprisonment without parole, but also forfeits defendant's right to appeal the issue of the admissibility of that damning evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment of the United States Constitution provides in pertinent part that:

> "In all criminal prosecutions, the accused shall. . . have the Assistance of Counsel for his defense."

2. The Fourteenth Amendment of the United States Constitution provides in pertinent part that:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

1. On December 29, 1976, petitioner was patronizing the Streamline Tavern at 3235 Fern Street, New Orleans, Louisiana. At approximately the same time, officers of the New Orleans Police Department's Felony Action Squad were on their way to the said lounge for the purpose of ascertaining whether one Lincoln Lewis (no relation to

the petitioner) was present therein. They had no search warrant.

The arresting officers at the trial of this matter stated that as they approached the tavern in their unmarked vehicle, one of several black males "loitering" in front of the tavern "hurriedly" entered the lounge. At that point, the officers exited their vehicle and pursued this individual. (It is to be noted that petitioner disputes this testimony and contends that he was sitting at the bar and not outside of it at the time the officers arrived.)

Once inside the location, the officers testified that the defendant, Sawyer Lewis, who was allegedly holding a brown leather-type jacket in his hand, shoved something into the coat pocket, dropped the jacket into a booth, and walked away. At that point, one of the officers, John F. Marie, approached the booth, picked up the jacket, and instituted a search of its pockets whereupon he allegedly discovered a quantity of heroin in tinfoil packets which were additionally concealed in rubber balloons. Officer Marie testified that at the time of the search, one of the rubber balloons was ripped at its bottom thereby exposing a quantity of the heroin. The petitioner was then arrested.

2. On January 6, 1977, a true bill was returned by the Orleans Parish Grand Jury in a matter entitled, "State of Louisiana v. Sawyer Lewis, No. 257-998," indicting the said Sawyer Lewis for an alleged violation of La. Revised Statute 40:966, Possession of heroin with the intention to distribute. On January 11, 1977, the

Petitioner was arraigned and on February 28, 1977, he was found guilty as charged by jury verdict. On March 31, 1977, Mr. Lewis was sentenced by the trial court to life imprisonment without the benefit of parole. At the trial of this case, petitioner was represented by one George E. Mouledeaux, Esq., retained counsel, who having interviewed Mr. Lewis on at least one occasion and having had access to the transcript of a preliminary examination failed to file a motion to suppress the evidence. On or about May 5, 1977, petitioner dismissed the said George E. Mouledeaux and retained undersigned counsel who then filed a petition for writ of habeas corpus in the Criminal District Court for the Parish of Orleans. On August 16, 1977, petitioner's writ of habeas corpus was denied before the trial judge, the Honorable Charles R. Ward. A petition for writs of certiorari, mandamus and prohibition was filed with the Supreme Court of Louisiana on October 12, 1977, which writ was denied on November 23, 1977. (Two of the seven justices' opined that the writ should have been granted. Justice Dennis stated that the evidence was illegally seized and that the writ should have been granted.) On December 1, 1977, a petition for writ of habeas corpus was filed in the Federal District Court, bearing the No. 77-3577, Section "E," which was also denied by the Honorable Fred J. Cassibry on December 26, 1978. A notice of appeal was filed by the petitioner on January 3, 1979, and the Honorable Fred J. Cassibry signed an order certifying this record as having probable cause for an appeal pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

On February 4, 1980, the Court of Appeals for the Fifth Circuit affirmed Judge Cassibry's decision precipitating this writ.

3. At the hearing on petitioner's writ of habeas corpus before the trial court, Mr. Mouledeaux, appellant's former retained counsel, testified in the following regards:

A. That the arresting officers did not have probable cause to follow the appellant into the tavern. (The transcript of that hearing is attached hereto as Appendix A. p. 15, line 27; p. 16, lines 1-3, Appendix A.)

B. That the defendant had a right to bring a motion to suppress. (Appendix A, p. 18, lines 21-25.)

C. That there was sufficient time for a motion to suppress to be prosecuted. (Appendix A, p. 6, lines 3-6.)

D. That the defendant would not have been prejudiced in any way had the motion to suppress been pursued. (Appendix A, p. 19, lines 10-15.)

E. That he, Mr. Mouledeaux, did not object to the introduction of the evidence on the grounds that it resulted from an illegal search although he had prepared such a motion. (Appendix A, p. 6, lines 23-27.)

F. That a motion to suppress was not filed because he felt that such would be a breach of his professional responsibility (Appendix A, p. 19, lines 21-27; p. 20, lines 1-6); evidently because, although the arresting officers had no probable cause to follow the petitioner into the bar, they did have a right to enter it and, once inside, had a right to search any coat found on the premises.

(Appendix A, p. 15, line 27; p. 16, lines 1-3, p. 16, lines 15-27; p. 17, lines 1-6.)

REASONS FOR GRANTING THE WRIT

The issue which is presented for review is one which is unique and is ripe for determination by the Court. Failure to grant review here would deprive a man of a lifetime of liberty without parole because of the gross incompetence of his retained counsel, a result that has no place in a civilized culture. The sole evidence, heroin, was seized from appellant's jacket blatantly violative of the Fourth and Fourteenthe Amendments to the United States Constitution, Ybarra v. Illinois, 100 Sup. Ct. 338(1979), but can the Sixth Amendment be utilized to correct this gross error of retained counsel? We feel that it must.

The standard for judging the effectiveness of retained counsel is set forth in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975) (en banc):

> "In sum, whenever the actions of retained counsel operate to deprive the trial of fundamental fairness then the Fourteenth Amendment due process had been violated notwithstanding any kind of specific involvement by a particular state official. If a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown."

It follows then that to establish a denial of the Sixth Amendment right to counsel, where defendant has retained counsel, a showing of either that retained counsel's performance was "so grossly deficient as to

render the proceedings fundamental unfair" or that retained counsel's incompetence is so apparent that a reasonably attentive official of the State should have been aware of it and could have corrected it, must be made. Fiztgerald v. Estelle, supra; Howard v. Henderson, 519 F.2d 1176 (5th Cir. 1975); United States v. Childs, 571 F.2d 315 (5th Cir. 1978).

And the Sixth Amendment to the Constitution of the United States, made applicable to the states through the due process clause of the Fourteenth Amendment, guarantees to every defendant in a criminal trial the assistance of counsel for his defense. Gideon v. Wainwright, 372 U.S. 335 (1963). This is an absolute right, requiring the strict protection of the courts, and any conviction in a case wherein a criminal defendant has not enjoyed this fundamental right is void. Johnson v. Zerbst, 304 U.S. 458 (1938).

Recognition of the inviolable constitutional right of a criminal defendant to the effective assistance of counsel, stems from the decision in the case of Powell v. Alabama, 287 U.S. 45 (1932), wherein the Court spoke of giving "effective aid in the preparation and trial of the case." Id. at 71. Like the right to counsel itself, there is little doubt but that the right to "effective representation" by counsel is now firmly woven into our constitutional fabric. See, e.g., McMann v. Richardson, 397 U.S. 759 (1970); Reece v. Georgia, 350 U.S. 85 (1955); Avery v. Alabama, 308 U.S. 444 (1940). Thus, it has been repeatedly held that a defendant may not legally be found guilty except at a trial in which his constitutional rights are scrupulously observed and, consequently, no conviction

can stand if the accused is denied the effective assistance of counsel. See, e.g., King v. Beto, 305 F. Supp. 636 (S.D. Tx. 1969); and Coplon v. United States, 191 F. 2d 740 (D.C. Cir. 1950).

Retained trial counsel's representation in this matter fell well below the standard imposed upon retained counsel by Fitzgerald, supra and its progeny as the record clearly reflects:

1. Although counsel was retained over one month prior to trial, he conferred with his client on but one occasion, which consultation, because of its brevity, was clearly inappropriate for the purpose of conducting a legal and factual investigation, particularly in light of the circumstances surrounding the seizure of the narcotic substance of which Appellant was alleged to have been in possession.

2. Although the arresting officers lacked the probable cause necessary to institute a search of Appellant's personal property, trial counsel, nevertheless, failed to file and pursue a motion to suppress the illegally seized evidence.

3. By failing to pursue a motion to suppress, and by failing to properly object to the introduction of the evidence, Appellant was denied a substantial defense to the charge. This is particularly true when it is remembered that the state's entire case against the Appellant, and the only incriminating evidence introduced therein, arose from the unauthorized and illegal seizure.

4. Trial counsel's failure to permit the Appellant to testify in his own behalf served to prejudice Sawyer

Lewis and constituted an incompetent and negligent decision, especially since other defense witnesses were not called and Appellant could not have been prejudiced thereby.

5. Trial counsel's conduct in the trial of this case was perfunctory at best. As the record evidences, counsel failed to vigorously cross-examine adverse state witnesses; failed to object to numerous leading questions; and, failed to present any affirmative matter on behalf of the defense.

There is little doubt but that defense counsel is duty bound to confer with his client without delay and as often as necessary so as to elicit matters of defense, or to ascertain those potential defenses which may be available. See, Starnz v. McGuire, 512 F.2d 918 (D.C. 1974); U.S. v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). Counsel must, therefore, promptly advise his client of his rights and take all actions necessary to preserve such, insofar as certain rights can only be protected by prompt legal action. In this regard, and with particular reference to the instant case, counsel must be prepared, where appropriate, to make motions for the suppression of illegally seized evidence. See, U. S. v. DeCoster, supra; Government of the Canal Zone v. C, 479 F.2d 1253 (5th Cir. 1973.)

In the instant case, trial counsel conferred with Appellant only once prior to the day of trial. Testimony, derived from the Habeas Corpus proceeding, indicates that Mr. Mouledoux spoke with the Appellant on one occasion, over one month prior to trial, for a period of about twenty minutes; and returned the next day only to have Mr. Lewis execute a Power of Attorney so that a retainer might be

withdrawn from the Appellant's bank account. Thereafter, counsel did not confer with his client until the morning of the trial at which time Mr. Mouledoux informed the Appellant that Appellant would not be permitted to take the stand in his own defense.

Based on the record herein, it is clear that the scant attentions paid by Mr. Mouledoux to the defendant's pending criminal prosecution denied Appellant a substantial defense to the State's charge. It is to be remembered that the State's entire case against the Appellant revolved about the seizure of the narcotic substance. Notwithstanding this slender thread upon which the conviction of Sawyer Lewis might be based, Mr. Mouledoux either through neglect or uninformed reasoning failed to even attempt to have the evidence excluded. That the defense of an unconstitutional seizure was not raised by trial counsel, clearly suggests that the brevity of consultation and the resultant lack of preparation, were not sufficient to prepare a viable defense to the charge. There can be no other explanation for this inexcusable failure.

As is evident, the basis of Appellant's claim of ineffective representation rests upon defense counsel's failure to pursue the most logical and simple defense available -- that being suppression of the evidence illegally seized. This was not an error which can be easily ignored for while counsel for a defendant has no duty to fabricate defense, or to put forth defenses he believes to be of little worth, he does have a duty to determine which ones do exist and to act thereupon in full pursuit. Jones v. Cunningham, 313 F. 2d 347 (4th Cir. 1963).

In the present case, in evaluating whether Mr. Mouledoux erred in failing to file and pursue a motion to suppress, an appraisal must be made of the facts known, available, or with minimal diligence, accessible to defense counsel; and, a determination made as to whether those facts raised any reasonable doubt as to whether a defense was affordable. United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974). While the issue of whether the search and seizure of Appellant's personal property is not wholly before this Honorable Court, Appellant's claim of ineffective trial representation can only be adjudged in light of that issue and for that reason, the question of whether the seizure herein was constitutional must be considered in part.

It is clear that the arresting officers in this case lacked probable cause to follow the Appellant into the tavern. Even Appellant's trial counsel would agree with this. (Appendix A, p. 15, line 27; p. 16, lines 1-3.) Mr. Mouledoux contends, however, that the officers did have such probable cause to search the coat belonging to the Appellant because it was abandoned. Whether through ignorance or neglect, however, this incorrect appreciation of the law served to condemn Sawyer Lewis and deprive him of any possible defenses.

In the case of State v. Lawson, 256 La. 471, 236 So.2d 804 (1970), the Louisiana Supreme Court held that if the police do not have the right to make an investigatory stop, property abandoned or otherwise disposed of as a result thereof cannot be legally seized. Such is precisely, however, what occurred in this case where police officers failed to even confront the defendant until such time as a thorough search had been made of his personal effects.

As this Court well knows, subject to certain exceptions, searches conducted outside the judicial process are per se unreasonable under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 88 Sup. Ct. 507 (1967). In the instant case, the search of the Appellant's coat was conducted without a warrant. Moreover, not one of the recognized exceptions to warrantless searches is to be found herein. Thus, the search of Appellant's personal belongings prior to his arrest constituted an unreasonable and illegal search and seizure. Such evidence, pursuant to the exclusionary rule enunciated in Mapp v. Ohio, 361 U.S. 643 (1961), should not have been introduced in this case.

It is to be remembered that this was not a prosecution where the State was able to produce an overwhelming amount of evidence as to the alleged guilt of the Appellant. Rather, the entire conviction herein rested solely on the testimony of the arresting officers and the introduction into evidence of the narcotic substance allegedly discovered in Appellant's pocket. Notwithstanding this fact, no objection to the evidence on Fourth Amendment grounds was made. This is true even though Mr. Mouledoux knew that where a tangible object is sought to be excluded from evidence because of an unconstitutional search and seizure, the defendant must timely file a motion to suppress evidence or be deemed to have waived the objection to its admission based on an infirmity in the search or seizure. See, State v. Womack, 283 So.2d 708 (La. 1973); La. C.Cr.P., Art. 703.

What is crucial and operative in this case, is the fact that counsel's failure to suppress the evidence was so egregious as to render the verdict of guilty inevitable.

This is not a situation where trial tactics dictated an attorney's decision not to proceed upon or advance a particular matter; in fact, the question was not even one of tactics or professional judgment. Rather, trial counsel was faced with the situation where a motion to suppress was the only available vehicle which could be employed in order to preserve the rights of the defendant. To have failed in this regard, denied Sawyer Lewis a substantial defense and rendered the verdict of guilty inevitable.

Trial counsel's other failures in the defense of the petitioner are minor as compared with his failure to pursue the suppression of evidence. Of particular import, however, was counsel's failure to put the defendant on the witness stand so that he might testify in his own behalf. Once again, it is to be remembered that the State's case against the Appellant was based entirely on the illegal seizure. Since counsel failed to pursue a Motion to Suppress, and since he intended to advance the defense that the police had planted the evidence in the Appellant's coat, it is common-sensical to assume that he would permit the defendant to testify in this regard. Nevertheless, counsel informed Appellant that he would not permit Appellant to take the stand even though no other defense witnesses were available. Once again, Sawyer Lewis' defense was laid bare.

CONCLUSION

This case presents the opportunity for the United States Supreme Court to espouse the critical but necessary views of Chief Justice Burger about the incompetence of American Trial Lawyers. They should no longer be coddled

at the expense of the poor, the misinformed, the ignorant, and the disinfranchised. It is inconceivable that under the facts presented here that the evidence used against Sawyer Lewis would not have been suppressed if not by the trial judge, certainly by the Louisiana Supreme Court in view of the decisions cited herein. But, retained counsel's failure to act in a manner consistent with the Sixth Amendment deprived this individual of literally the rest of his life and such conduct is simply not acceptable in our American system of justice. It is, therefore, respectfully submitted that this desperate man's prayer should be answered by the granting of the writ prayed for herein.

Respectfully submitted,

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79-6514

APPENDIX A.

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STATE OF LOUISIANA — CRIMINAL DISTRICT COURT

VERSUS — PARISH OF ORLEANS

SAWYER LEWIS — SECTION "A", CASE 257-998

Transcript of writ of habeas corpus hearing heard August 16th, 1977, in the above named and numbered matter, before the HONORABLE CHARLES R. WARD, Judge presiding.

APPEARANCES:

NICK F. NORIEA, JR., ESQ.
ASSISTANT DISTRICT ATTORNEY
REPRESENTING THE STATE OF LOUISIANA

JACQUES F. BEZOU, ESQ.
COUNSEL REPRESENTING THE DEFENDANT

REPORTED BY:

ELLIS M. GILL
OFFICIAL COURT REPORTER

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MR. BEZOU:

Jacques F. Bezou on behalf of petitioner, Sawyer Lewis. And we are ready to proceed at this time. If the Court please, I would like to call on cross examination George E. Mouledoux.

GEORGE E. MOULEDOUX, who, having been duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. BEZOU:

Q Please state your full name for the record, sir?

A George E. Mouledoux.

Q What is your occupation?

A Attorney at Law.

Q And how long have you been so engaged?

A Fourteen and a half years.

Q Are you a member of the Bar of the State of Louisiana?

A I am.

Q Are you familiar with Sawyer J. Lewis, the gentleman sitting before us?

A I am.

Q Did you represent him in the matter entitled number 257-998 A, State of Louisiana

versus Sawyer Lewis?

A I don't know if the number is correct. I did represent him in a matter in this Court entitled State of Louisiana versus Sawyer J. Lewis.

Q Do you remember what the charge was, sir?

A Yes. It was possession of narcotics with intent to distribute.

Q You remember what narcotics was involved, sir?

A What's that, sir?

Q You remember what narcotics?

A Heroin.

Q Now, at what stage of the proceedings did you represent Sawyer Lewis, sir?

A Before trial.

Q Did you represent him at the preliminary examination?

A No, I did not.

Q Were you appointed to represent Mr. Lewis? Or, were you retained?

MR. NORIEA:

I object to the relevancy.

THE COURT:

Overruled.

BY THE WITNESS:

A Retained by Mr. Lewis to represent him.

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DIRECT EXAMINATION RESUMED BY MR. BEZOU:

Q Now, did you have an opportunity to visit with Mr. Lewis prior to the trial of this matter?

A Yes, sir, I did.

Q And where was that that you visited him, sir?

A In the Parish Prison.

Q On how many occasions?

A I don't remember exactly. Two, three, four, times.

Q You are sure about that?

A Yes. Absolutely sure. Because that's my standard procedure when I represent some one to see them as many times as necessary before a trial.

Q I see.

A Or before any proceedings are disposed of or any plea is entered.

Q It's your testimony you did in fact represent this gentleman before the trial itself; is that right, sir?

A Before the case went to trial in this Courtroom I represented Sawyer J. Lewis.

Q Do you recall about how long before you went to trial that you were retained

to represent this man?

A I can't be exactly specific.

Q Would it have been sufficient time to file any motions if you deemed necessary?

A Absolutely.

Q Absolutely?

(Witness nods head in the affirmative.)

Now, did you have access to the transcript of the preliminary examination?

A I did.

Q Did you read the transcript of the preliminary examination?

A I did.

Q It's a fact, Mr. Mouledoux, that you filed no pre-trial motions in this case?

A Correct.

Q Are you aware that the penalty for possession with intent to distribute heroin was mandatory life?

A I am. And I was.

Q You were at that time?

A Correct.

Q It's a fact, Mr. Mouledoux, you did not file a motion to suppress the evidence in this case too; isn't that right, sir?

A I think the record will reflect that.

Q Would you explain to the Court why you did not file any pre-trial motions in the case, Mr. Mouledoux?

A I did not think they were necessary since the District Attorney had pretty well opened its file to me. And, I, after having discussed the matter with my client, I was satisfied that the information that I had was sufficient to proceed with the trial of this matter.

Q Was it your opinion, then, that after reading the transcript of the preliminary examination and after conducting your investigation, which I assumed included speaking with the defendant, there was no possibility and no duty on your part to file a motion to suppress the evidence in this case?

A That's correct.

Q Now, you did read the preliminary examination, the transcript, you testified?

A Yes, I did.

Q Let me refresh your memory, because I don't think you would remember the transcript nor anyone verbatim after this lapse of

time.--

At page two of the transcript of the preliminary examination, the police officer testified, John F. Marie,Jr., testified on direct examination. By the Assistant Prosecutor, Mr. Philipp, as follows: "At approximately 6:30 P. M., my partner, Officer Warren Keller, and I were making a routine wanted check at the Streamline Tavern, located at 3235 Fern Street. As we pulled up our police car to that location, observed the defendant along with several other black males loitering in front of the bar. At that time as I alighted out of my police car and began to approach the bar, the defendant broke and ran inside the tavern. At that time, I immediately followed the defendant into the barroom and observed him run to the right side of the barroom, reach in and grab a coat which was in a booth, place something inside the left front coat pocket of that coat and discard it into the booth and then walk away."

Now, on the basis of that portion of the testimony, you feel that the police had probable cause to detain this man, to search him, to search his coat?

A I would have to decline to answer that question at this time until I speak to the Court and ask the Court whether I will be permitted to divulge confidential information given to me by my client.

MR. BEZOU:

Excuse me, Your Honor, the question is not--the question at this point is from the testimony I read to him from the preliminary examination. On the basis of that, he will have an opportunity at a later time, I'm sure, on cross examination, to expand. I want to know his answer to this particular question now.

THE WITNESS:

You're asking me--

THE COURT:

Just a minute. I feel Mr. Mouledoux is correct. Because you're asking

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him to answer a question without giving you the basis upon which he is going to predicate his answer.

Now, Mr. Mouledoux has said that he has made a decision based upon information supplied to him by the defendant. Now, if the defendant wishes to waive his right to exert the attorney-client privilege, I will permit Mr. Mouledoux to testify.

I want to interrogate the defendant and determine whether or not he is going to waive that privilege. Otherwise, Mr. Mouledoux will not be able to answer completely.

MR. MOULEDOUX:

Yes, Your Honor, I think the law is to the effect if you bring an action against your attorney or doctor or anyone who has a privilege, that the person, that the privilege is then destroyed when the witness has testified.

MR. BEZOU:

The poit of this, Your Honor, is that

I'm going to get into the other considerations. And I am going to ask him specifically what Mr. Lewis told him about the case at a later time. I'm concerned now with bringing this matter to the Court and what I consider a logical order. That is to first of all go into the transcript of the preliminary examination. And then I would go into his conversations with Mr. Lewis after that. I assure you I will. And I think it will just confuse the matter to bring in any extraneous matter at this time.

THE COURT:

I think you are correct that the attorney-client privilege is waived. But then Mr. Mouledoux's answer would be based upon the information received from the defendant which he is not disclosing at this time. And based upon the preliminary examination of the transcript he felt it was

not prudent to file a motion to suppress. It's going to be a partial answer. Because I would not know what he conversed with the defendant about, what his answers were.

Now, if you wish to go into it piece meal, it would be in this vein, I would permit it.

Mr. Mouledoux, can you answer in light of the question and in light of what the ruling would be?

MR. MOULEDOUX:

I would request the Court specifically to ask Mr. Sawyer Lewis if he at this time in spite of what the law may be, that he specifically state he waives the client-attorney relationship.

Your Honor, anything I may say here could be used against him at a future trial.

THE COURT:

Out of abundance of precaution, would you stand by the microphone.

(Mr. Lewis complies.)

Mr. Lewis, anyone who speaks with an

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attorney in an attorney-client relationship has a privilege. The attorney is prohibited from telling anyone what the client has divulged to him in his confidential relationship. This means you have a privilege of your communication to Mr. Mouledoux when he represented you that you would be privileged so that he may not testify or divulge to anyone what you have told him without your consent.

The question, now, is: Do you give Mr. Mouledoux consent to divulge what you told to him during the course of his representation to you for these charges to the Court or anyone else?

BY MR. SAWYER J. LEWIS:

Yes, sir.

BY THE COURT:

You understand, now, that you are waiving that privilege of confidentiality that you once had? Now Mr. Mouledoux may divulge to anyone what you have previously

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told him in confidence?

MR. BEZOU:

Excuse me, Your Honor. I think the law has a privileged way of a purpose of acting when hearsay is involved.

THE COURT:

Well, with regard to this case, but not regard to any other case. In regard to the charge against you, meaning possession with intent to distribute a controlled dangerous substance, heroin. Do you understand this, now?

BY MR. SAWYER J. LEWIS:

Yes, sir.

BY THE COURT:

Do you consent to have Mr. Mouledoux divulge to the Court and anyone else what you told him at the time he represented you?

BY MR. SAWYER J. LEWIS:

Yes, sir.

THE COURT:

I feel that's sufficient. Answer the question.

BY THE WITNESS:

A On the basis of the--

DIRECT EXAMINATION RESUMED BY MR. BEZOU:

Q On the basis of what I read to you from page two of the transcript of the preliminary examination. Based on that information alone, do you feel that in your mind the police had probable cause to chase after Sawyer Lewis and search his coat?

A Based on that alone, I would say they did not. On that alone.

Q I understand that. I refer you then to page three,"I didn't see the man I was looking for originally. I walked over to the coat, knowing no one had been around the coat other than the defendant, quickly looked into the right front pocket, figuring that the--" excuse me, maybe we can cut this thing short. Would it be your opinion, then, on the basis of the preliminary hearing of the preliminary examination cold and the basis of that alone that you would have felt the police did not have probable cause to apprehend that man or search his coat?

A Well, I have to qualify my statement. They

didn't have probable cause to follow him into the place. That's as far as I will go on answering that question.

Q Well, if they didn't have probable cause to follow him in there, they didn't have probable cause to do anything once they were in there.

A Maybe I must qualify it further. Maybe they didn't have probable cause to follow him specifically in the place because he was standing on the sidewalk and merely walked inside. But, that's--I will stand on that statement. But they had a right to go inside the barroom.

Q Do you feel that they would have had probable cause to search a man's coat in the detail they did? If you recall they went into the pockets very carefully. You think they had probable cause to do that without them seeing a weapon or without the coat being on his person or without them being in danger of their lives?

A Since at the time they went into it he wasn't near it, I feel it was, that they had a right to go through any coat on the premises.

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Q I'm sorry?

A I feel the police had right to search any abandoned or stored material when no one was near it. These answers I'm giving you now are predicated also on what he told me later.

Q Now, even though you felt that perhaps--well, you testified there was no reason to follow him into the bar. It was your opinion that the police could have had probable cause to, could have had a right to search that abandoned, what you call abandoned jacket? Don't you feel as a lawyer you had a duty to file a motion to suppress the evidence?

A You're asking me to answer a question before I have been able to give the reason why I didn't file the motion to suppress.

Q I'm interested to know the reason you didn't file the motion to suppress.

A Now, we're getting to it. Because Mr. Sawyer Lewis advised me he didn't go near that coat. He didn't put anything in that coat. That the police walked over to the coat and they put something in the pocket. Which was then a matter for the jury to determine on the trial

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on the merits. Now, that--

Q Mr. Mouledoux, are you aware that the present constitution of the state of Louisiana gives anyone a right to file a motion to suppress--

THE COURT:

I feel that's becoming argumentive now. I don't feel that's a proper question.

BY THE WITNESS:

A I had a motion--

THE COURT:

Just a minute.

DIRECT EXAMINATION RESUMED BY MR. BEZOU:

Q Do you feel--oh, excuse me, Your Honor.

THE COURT:

I feel you are getting into matters which I must answer myself rather than Mr. Mouledoux.

DIRECT EXAMINATION RESUMED BY MR. BEZOU:

Q Did Sawyer Lewis have standing to bring a motion to suppress in your opinion?

A You mean did he have a right under the law?

Q Yes. Did he have a right under the law?

A Certainly he had the right.

Q Was it your opinion, then, that, was it your absolute opinion that no Court of law

could reasonably find that the police did not have probable cause to search that coat?

A Obviously. If I felt, definitely I would have filed a motion to suppress that I prepared and decided at the last moment after speaking with Mr. Lewis again, there was no need to file a motion to suppress.

Q In which way would Mr. Lewis had been prejudiced if you filed a motion to suppress, Mr. Mouledoux?

A I don't think he would have been prejudiced.

Q At all?

A I don't see where he would have been prejudiced.

Q You do know since you did not file the motion to suppress that issue was not reserved for appeal?

A That's correct.

Q You knew that when you filed it?

A That's correct. I also know my professional responsibilities are to present motions to the Court not frivolous or not untrue or not which are obviously misleading to both the Court and defendant.

Q So you felt the final motion to suppress in the case would be a breech of your

duties?

A I do. For the simple reason Mr. Lewis gave me a completely different story than which came out in the hearing, preliminary hearing, in the Magistrate Court.

Q Of course that isn't the issue, I don't believe, Mr. Mouledoux.

A I made a professional determination.

MR. NORIEA:

Objection. He is arguing with the witness, Your Honor.

DIRECT EXAMINATION BY MR. BEZOU:

Q Mr. Mouledoux, did you object to the introduction of that evidence at trial?

A I did.

Q On what grounds, sir?

A I don't remember. The Court overruled.

Q Did you specifically object to the introduction of the heroin on the grounds that it had been the fruits of an illegal search?

A No, I didn't. I represented my client on the basis of the information he gave me.

Q Mr. Mouledoux, you testified earlier that you spoke with Mr. Lewis on several occasions; is that right, sir?

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A Correct.

Q Did you also speak with him on the morning of the trial?

A Yes, I did.

Q Did Mr. Lewis at anytime ever advise you that he wanted to testify on his own behalf?

A We discussed it. But he didn't tell me absolutely specifically that he wanted to testify.

Q He never said that to you?

A Absolutely not. If I remember correctly, we had the whole lunch period for him to decide whether or not he was actually going to take the witness stand. I also found during the lunch hour he had given me some erroneous information as to his past background.

Q What erroneous information?

A As to his arrest record.

Q Arrest record?

A Yes, sir.

Q Don't you know that's not admissible?

A I didn't say I was going to admit anything, to have a problem with him on the witness stand. I didn't say that.

Q Would it be a problem if it were really an

arrest record?

A What I'm trying to tell you is that the man had not been truthful to me about his past record. I didn't say his conviction record or police record.

Q Well, I get the impression, then, you were punishing him for not being truthful?

THE COURT:

I don't think that's a proper question. Disregard that.

MR. BEZOU:

I apologize to the Court.

BY THE WITNESS:

A Mr. Lewis decided on his own that he was not going to take the witness stand.

DIRECT EXAMINATION RESUMED BY MR. BEZOU:

Q That's your testimony?

A Absolutely.

Q It was nothing to do with whether or not he had arrest or anything like that?

A No. That's something I found out during the lunch hour.

Q Mr. Mouledoux, Mr. Lewis is also bringing this action on the grounds you were intoxicated at the time of trial. Do you deny that, sir?

A Absolutely. On May 13th, 1974, I gave up

drinking. And I have witnesses to that fact. Of course, I don't have anybody that's been with me twenty-four hours a day. On May 13th, 1974, was the last day I had a drink.

Q Is it your testimony that was the last time you had an alcoholic beverage?

A Other than a glass of wine at dinner time, yes, that's my testimony.

Q Mr. Mouledoux, have you ever been treated for alcoholism?

A Not at all. It was voluntary abstinence on my part.

Q Would you tell us, if you can, the significance of May 13th, 1974?

A That's the day I quit drinking. May the 12th, I had a drink. May the 13th, I didn't. I think you will find that's on a Monday. It was a pretty wet Sunday.

Q Mr. Mouledoux, where were you the morning of the trial before you arrived in the Courtroom?

A I presume I was at my home.

Q And it's your testimony you had no alcoholic beverages that morning?

A Correct; absolutely.

Q So, if Mr. Lewis were to testify he smelled

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alcohol on your breath, he would be incorrect?

A It wasn't my breath he was smelling. He didn't say anything to me at the time even.

Q He didn't say anything to you about wanting to testify either?

A We discussed his possibility of testifying.

MR. BEZOU:

I tender the witness, Your Honor.

CROSS EXAMINATION

BY MR. NORIEA:

Q Mr. Mouledoux, isn't it a fact I told you about the whole case before trial?

A Certainly. I can't say the whole case. But I knew enough about the case when I went to trial. There were no surprises.

Q Didn't I give you as much or more information you could have obtained in a bill of particulars and prayer for oyer?

A No doubt in my mind. I already said that before the question was asked.

MR. NORIEA:

No further questions.

MR. BEZOU:

No further questions from this witness,

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Your Honor.

THE COURT:

Thank you.

MR. BEZOU:

If the Court please, I would like to call Sawyer Lewis to the stand.

SAWYER J. LEWIS, who, having been duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. BEZOU:

Q Please state your full name?

A Sawyer James Lewis.

Q Are you presently incarcerated under the authorities of the Louisiana Department of Corrections?

A That's right.

Q Your sentence is life?

A That's right.

Q Were you represented by Mr. George Mouledoux at the time you were convicted of possession of heroin with intent to distribute?

A Yes, sir.

Q Was that in this Courtroom right here before this Judge?

A Right.

Q You remember when that was?

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A February the 28th, 1977.

Q You know what the verdict was, sir?

A Guilty.

Q Mr. Lewis, you heard Mr. Mouledoux testifying that he met with you on several occasions. Would you relate to the Court as best you can on what occasion you met with Mr. Mouledoux and under what circumstances, sir?

A Twice.

Q When was that, sir?

A The day my mother-in-law sent him my lawyer retainer. And the next day he come and got the money. And haven't seen him since the trial.

Q I can't hear you very well.

A The day he came over to represent me, let me know he was my lawyer. And the next day he come got the money. And I haven't seen him since till trial.

Q How long before the trial did he come to see you?

A No time.

Q No. The first time he saw you, was that before the trial?

A Right, representing me.

Q How long before the date of the trial was that,

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the first time he came to see me?

A Over a month.

Q Over a month?

A Yes. I would say about, something like around the 11th, I believe.

Q And how long did he visit with you that day?

A Oh, about, I guess about fifteen, twenty minutes.

Q Where was that, sir?

A In the Parish Prison.

Q And you retained him at that time to be your lawyer?

A Yes, sir, I did.

Q And when's the next time you saw him?

A Next day he came to get the money, that was it. He ain't said nothing else.

Q You said he came to get the money. You didn't have money in the Parish Prison; did you?

A No. In my bank account.

Q Sorry:

A In my bank account.

Q Something you signed?

A Right. Power of Attorney.

Q Did you discuss the case at that time with him?

A No, I didn't.

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Q When was the next time you saw him?

A At trial.

Q Did you speak with him the morning of trial?

A Yes, we talked. It wasn't about trial, though.

Q Did you speak with him about the possibility of your testifying?

A Right.

Q What did you tell him?

A I asked him could I testify on my behalf because I have nobody else to witness for me. He told me, "No." He said it wouldn't do no good because it's up to the jury to find me guilty.

Q Did you advise him only once that you wanted to testify? Would you tell us how you advised him you wanted to testify?

A We discussed about testifying. He got his investigator go look up my record and come back to the table right there where I was sitting, the same place. Got his investigator to come back and find out I was convicted for marijuana. He said that would be looking bad against me. He say, "I advise you not to take the

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stand." I said, "I want to. Nobody else to vouch for me. If I don't take the stand, it will look like I am guilty anyway."

Q Mr. Lewis, you are also alleging Mr. Mouledoux was intoxicated at the time of the trial. Would you tell us why you felt he was intoxicated?

A He had the smell of liquor on his breath. He was nervous. Everything he cross examined I had to tell him out of the transcript. Because I read the transcript out the hearing. I had to tell him that the officers were contradicting his statements and all of this.

Q Were you sure that the smell on his breath was liquor?

A That's right. I know liquor when I smell it.

Q Mr. Mouledoux ever tell you at anytime he was going to file motions on your behalf?

A No.

MR. BEZOU:

I tender the witness, Your Honor.

CROSS EXAMINATION

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BY MR. NORIEA:

Q Mr. Lewis, did you talk with Mr. Mouledoux the morning of trial?

A Right.

Q And how many total times did you talk to Mr. Mouledoux?

A We talked quite frequently. We said a few things before the trial.

Q Previous, prior to that, how many times did you see Mr. Mouledoux?

A Twice.

Q How many times did you see Mr. Bezou?

MR. BEZOU:

Objection. That's totally irrelevant to this proceeding.

THE COURT:

Sustained.

CROSS EXAMINATION RESUMED BY MR. NORIEA:

Q Did you tell Mr. Mouledoux you wanted to take the witness stand?

A That's right.

Q Did you tell Mr. Mouledoux that the police planted this stuff in your coat?

A Did I tell him they planted it?

I don't know how it got there. I don't know how he got that. I don't even know.

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Q You don't know what you told Mr. Mouledoux?
A I didn't tell him that.
Q What did you tell him?
A What I told him, I was in the barroom and they come to me and said they found dope in my pocket.
Q That's all you told him?
A Yes.
Q You didn't think it was wise to tell him anything more?
A What more could I tell him? I was in--
Q Didn't you tell him your driver's license was in the coat too?

MR. BEZOU:

Objection.

THE COURT:

Just a minute. What's your objection?

MR. BEZOU:

The witness was trying to complete the answer.

THE COURT:

Yes. I sustain that. Let's hear the complete answer.

CROSS EXAMINATION RESUMED BY MR. NORIEA:

Q What else did you tell Mr. Mouledoux?
A I told him, for us going to trial, I told him they came in there, the police

came in there, there was a crowd of people in the place all over, had about twenty-five, thirty people in the place. Okay, the officer came in, I was sitting at the bar. My jacket was in the booth with my driver's license and light bill in it. That's what I told him. And the next thing I know they came in, walked to the back, came to the front, came over with the coat in his hands and dope in the other hand and said, "You are under arrest."

Q How did they know to come to you?

A The driver's license was in the pocket.

Q Was it dark in the bar?

A No, it wasn't. The door was opened.

Q It is your testimony you were not in front?

A Sir?

Q It's your testimony you were not out in front of the bar when the police came?

A Exactly; I wasn't. I was sitting at the bar when they came and arrested me at.

Q You say Mr. Mouledoux was drinking. You know for a fact he was drinking?

A I know liquor when I smell it.

Q Did you tell him during the trial that you thought he should stop the trial

because he was intoxicated?

A No, I didn't.

Q Why didn't you do that?

A I have nothing to do with his private life. I thought he knew what he was doing. People are capable of drinking and doing things without mistakes. It's not the alcohol. You can be drunk as you want and go on and nobody stop you.

Q Why don't you think Mr. Mouledoux did his job?

A Because he didn't.

THE COURT:

No.

MR. BEZOU:

I'm going to object to the opinion. The witness is not qualified.

CROSS EXAMINATION RESUMED BY MR. NORIEA:

Q Are you mad because you were convicted?

MR. BEZOU:

Objection.

THE COURT:

Sustained.

CROSS EXAMINATION RESUMED BY MR. NORIEA:

Q At the time you spoke with Mr. Mouledoux, how long did you speak to him?

A Which time?

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Q The time, start off at Parish Prison. How long did you speak to him the first time?

A About fifteen, twenty minutes.

Q You recall that day?

A I believe it was the 11th, if I'm not mistaken.

Q January the 11th?

A Right.

Q Or February the 11th?

A No. Not in February. He didn't come. After January I didn't see him no more.

Q When was the second time you spoke to him?

A The 12th, to get the money.

Q Did you pay money in the Parish Prison?

A No. He had to get it out of my account. I had to give the Power of Attorney.

Q You didn't speak with Mr. Mouledoux about the case the second time?

A No, I didn't. All he came to get the money and he left.

Q You give Mr. Mouledoux the names of any of the people in the bar that day?

A No, I didn't. I told him, you know, check around the bar and see anybody wanted to witness for me.

Q Who were you with at the bar that day?

A Who I was with?

Q Yes.

A I usually be by myself.

Q You didn't know anyone in the bar?

A Yes, I knew.

Q You didn't give anybody the names of people to testify in your behalf?

MR. BEZOU:

Objection, Your Honor. He just testified that he didn't give Mr. Mouledoux notice because he didn't know who was in the bar at that time.

THE COURT:

I sustain that.

CROSS EXAMINATION RESUMED BY MR. NORIEA:

Q How long had you been at the bar?

A I would say about, I came in about two and a half hours before they arrested me, four o'clock.

Q Who did you speak with in those two and a half hours?

A I spoke with a lot of people.

Q You didn't know their names?

A Yes, I know their names.

Q What are their names?

MR. BEZOU:

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I object to the relevancy and materiality of these questions.

THE COURT:

I sustain it.

Was it your defense you did not possess that dope that that dope did not belong to you?

BY THE WITNESS:

A Yes, sir.

BY THE COURT:

It's your defense the police planted the dope or mistakenly thought the dope came from your coat pocket?

BY THE WITNESS:

A Yes, sir.

MR. NORIEA:

Your Honor, I think these questions are relevant based on witnesses that can testify on his behalf.

THE COURT:

We are only dealing with whether or not it was a matter of incompetency not to file a motion to suppress based upon the knowledge Mr. Mouledoux may have had as a result of the

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preliminary examination and conversation with the defendant.

All right. You're excused, Mr. Lewis.

MR. BEZOU:

Your Honor, the Court please, the matter is submitted unless the Court would want a brief from the defendant.

THE COURT:

You have any witnesses?

MR. NORIEA:

Sheila Myers.

THE COURT:

I want to call a witness myself. But I will call Miss Myers.

SHEILA C. MYERS, who, having been duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. NORIEA:

Q State your full name, please?

A Sheila Carol Myers.

Q How are you employed?

A Assistant District Attorney for the Parish of Orleans.

Q Are you assigned to this section of Court?

A Yes, sir, assigned to Section "A".

Q How were you assigned on February 28th, 1977?

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A I was assigned as an Assistant District Attorney to Section "A".

Q Do you recall the trial I prosecuted against Mr. George Mouledoux involving the defendant Sawyer Lewis?

A Yes, I do.

Q During the course of that trial, did you observe any parts of it?

A Did I observe any part of the trial, sir?

Q Yes, ma'am.

A Yes, I did. I sat in the front row, which I generally do when someone else is in trial.

Q During the course of the trial, the recess, did you have occasion to speak with George Mouledoux, the Defense Attorney?

A I spoke with Mr. Mouledoux that morning prior to trial to go over with him to kind of facilitate the order of the docket that morning. I generally try to speak with Defense Attorneys before the trial begins.

Q How long did you speak with him?

A Maybe three or four minutes, sir.

Q Did you smell any alcohol on his breath?

MR. BEZOU:

Objection. Leading.

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THE COURT:

Overruled.

BY THE WITNESS:

A I detected no alcohol on Mr. Mouledoux when I spoke with him.

Q Did you notice anything unusual about his behavior which would lead you to believe he was intoxicated?

MR. BEZOU:

Objection, Your Honor. Leading.

THE COURT:

Overruled. It is leading. But I will permit it. This is an attorney, rather, an officer of the Court. I'm sure that she cannot be led and words cannot be put in her mouth by leading questions.

BY THE WITNESS:

A During the order of the trial where I observed, Mr. Noriea, I noticed nothing that would distinquish Counsel for the defendant's behavior from your behavior during the trial. There were objections by both people and both were participating in the trial.

MR. NORIEA:

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I have no further questions.

MR. BEZOU:

No questions.

MR. NORIEA:

Your Honor, I would like to take the stand.

NICK F. NORIEA, JR., who, having been duly sworn by the Minute Clerk, testified as follows:

TESTIMONY BY MR. NORIEA:

Your Honor, I'm Nick Noriea, an Assistant District Attorney for Orleans Parish assigned to the Career Criminal Bureau. And I was assigned to prosecute Sawyer Lewis because of his status as a career criminal. And on February the 28th, 1977, I tried the case against Mr. George Mouledoux--

MR. BEZOU:

I object to the narrative form of the testimony.

THE COURT:

Overruled.

TESTIMONY BY MR. NORIEA:

During the course of the trial, I spoke to Mr. Mouledoux on numerous

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occasions. I would say at least four, five or six times during the day from prior to the trial when we were getting prepared to see if each was ready to go to trial all the way through jury deliberations, which was at the conclusions of the trial, during the lunch break, etcetera. At no time during the day did I detect alcohol on the breath of Mr. Mouledoux. At no time during the trial did I have suspicion that he may be in the least bit intoxicated. As a matter of fact, he conducted a fairly decent trial. Having prosecuted close to a hundred jury trials, I thought he was probably--

MR. BEZOU:

I object. The issue is not Mr. Noriea's opinim of Mr. Mouledoux's performance at the trial.

THE COURT:

I will ignore the opinion testimony.

TESTIMONY BY MR. NORIEA:

Mr. Mouledoux made numerous objections

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during the course of the trial which I thought I might be able to sneak past him, but was unable to sneak anything past him during the whole trial. That's about it.

THE COURT:

Cross examination?

CROSS EXAMINATION

BY MR. BEZOU:

Q Mr. Noriea, you spoke with Mr. Mouledoux prior to this hearing this morning?

A No. I mean I saw him in the Court. I asked him what was going on. He asked me if I had a copy of the motion you had filed. And I said, "No. I had thrown it away."

Q You have known him quite sometime now; haven't you?

A I would say so. As long as I have known you.

Q You are a Prosecutor; is that right?

A That's correct.

Q It's your duty to prosecute?

A That's correct.

Q So that you would like to see Mr. Lewis remain in prison since you are the Prosecutor of that capital conviction; is that right?

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A I think the jury decided that.

Q I'm asking you.

A If that's the jury's wishes.

Q Would you answer my question, please?

THE COURT:

No. I'm going to sustain, or I'm not going to permit the question on my own motion. I feel that his opinion is irrelevant.

MR. BEZOU:

I have no further questions, Your Honor.

MR. NORIEA:

There's no other witnesses.

THE COURT:

I think I want to hear from Mr. Robert Zibilich. Mr. Zibilich will testify in this case. I'm calling Mr. Zibilich as a witness to the Court relative to the sobriety of Mr. George Mouledoux.

ROBERT J. ZIBILICH, who, having been duly sworn by the Minute Clerk, testified as follows:

EXAMINATION BY THE COURT:

Q Mr. Zibilich, how long have you been acquainted with Mr. Mouledoux?

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A At least seventeen years.

Q You are a member of the Bar of the state of Louisiana?

A I am,Your Honor.

Q Practicing in Orleans Parish?

A Yes, sir.

Q Particularly, you practice a great deal in the Criminal District Court for the Parish of Orleans?

A Yes, sir.

Q Were you ever in a partnership with Mr. Mouledoux in the practice of law?

A We were associated together for quite some time.

Q Particularly prior to the date of this trial, February 28th, 1977, did you have occasion to see Mr. Mouledoux often?

A Quite frequently. I don't see Mr. Mouledoux quite as much recently. But I would say up until probably January or February of this year, I saw him daily.

Q Can you state your observation to the sobriety of Mr. Mouledoux for approximately one year prior to February 28th, 1977?

A To my knowledge, he never took an alcoholic drink during that period. This was not true sometime long past.

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THE COURT:

Cross examination relative to the topic of sobriety?

CROSS EXAMINATION BY MR. BEZOU:

Q Mr. Zibilich, do you recall the conversation we had last Friday in your office?

A I do.

Q Do you recall me asking you specifically about the intoxication issue?

A Yes, I recall several things coming up;and when you said, "intoxicated," I said, "No, I can't believe that." I said, "It's possible. I'm not with him all day long." I specifically told you to my knowledge he had quit drinking.

Q You don't recall telling me that perhaps he still drinks on weekends, sir?

A I did not tell you that at all.

Q I'm not saying you did. I was trying to get our recollection straight. You were not with him the morning of the trial; were you, sir?

A No, I was not.

MR.BEZOU:

No further questions, Your Honor.

MR. NORIEA:

The State is prepared to submit it on

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the testimony heard today in Court.

MR. BE?OU:

Your Honor, if the Court please, the matter is submitted unless the Court would want a brief specifically on the legal issue of the propriety of filing a motion to suppress evidence in a case like this. I think the record is clear that a lawyer would have a duty to file a motion to suppress under these circumstances to protect the rights of the defendant, whether that duty has been breeched, and on that issue alone the defendant is entitled to habeas relief.

The record is clear from what, even from what Mr. Mouledoux says Mr. Lewis said, and from what Mr. Lewis said, and from what the preliminary examination reveals, that a motion to suppress was warranted here. There was no good cause for the police to go after Mr. Lewis. There was no good cause for them to go into his coat. There was no good cause for them to arrest this man

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and charge him with possession of heroin with intent to distribute. That's an essential issue to this case. And it's a critical one in view of the fact Mr. Lewis received a life sentence. It could also be due to the fact there is a sacred duty critical here. This man's rights should have been protected. No lawyer can assume, especially when he testifies there was no prejudicial facts had a motion been filed on behalf of Sawyer Lewis. It's irrelevant Sawyer Lewis may have said he didn't own the heroin. It's irrelevant because the motion to suppress the evidence the police would have testified. Their testimony could have been contradicted by the testimony on the preliminary examination. On hindsight, if you look at the testimony of the police officer at the trial and compare it with the preliminary examination, you see two things. One: A germaine, important contradiction. And, two: still

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no probable cause.

If you read the testimony of Officer Marie and Keller at the trial and you read the testimony of Officer Marie at the preliminary examination, still there's enough doubt. There's enough reason for a lawyer to have filed a motion to suppress the evidence. Even if the Court can agree with me this is absolutely the case where a motion to suppress would not be granted, that's not the issue. The issue is reasonableness. And I would submit to the Court that the Court should and would be of the opinion that a lawyer should reasonably assume that a motion to suppress the warrant would be in a case like this to protect the defendant's rights. And we, as lawyers, have a duty to do those things especially when the sentence could be mandatory life, which Mr. Mouledoux knew before going to trial. Predemitting the other aspect of the case, the fact of intoxication,

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predemitting Sawyer Lewis wanted to testify and was not allowed to testify, all we have is one person's testimony against the testimony of another person. And you're left in a deadlock.

But, you are not left in a deadlock about the cold,hard facts of this record at trial. You have before you the preliminary examination in print; you have the transcript of the trial in print and the testimony of Mouledoux and Lewis today which supports my opinion that a motion to suppress should have been filed and in fact is not filed. There weren't any pretrial motions for that fact, Your Honor.

MR. NORIEA:

If I may say, I don't think an attorney has a duty to file motions totally frivolous and without basis of property abandoned. On the second part, I told Mr. Mouledoux more about the case than he could have gotten in the bill of particulars, prayer for oyer and as well as if

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there was any discovery in the attempt motion to suppress if he wanted to file that. He knew just about the entire case before he went to trial that morning. That would be one of the things I spoke with him about prior to trial. That I noticed nothing was out of the ordinary with his breath or that he was acting unnormal. I submit it on that.

THE COURT:

The application for writ of habeas corpus is denied.

MR. BEZOU:

To which ruling we respectfully object, Your Honor.

* * * *

C E R T I F I C A T E

I, ELLIS M. GILL, Official Court Reporter, Criminal District Court, Parish of Orleans, Section "A", hereby certify that the foregoing pages of transcript in the case entitled and numbered State of Louisiana versus Sawyer J. Lewis, case number 257-998, is a true and correct copy of my shorthand notes done to the best of my ability and understanding.

Ellis M. Gill

Ellis M. Gill
Official Court Reporter

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Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1646

DO NOT PUBLISH

SAWYER LEWIS,

Petitioner-Appellant,

versus

LOUISIANA STATE PENITENTIARY,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(FEBRUARY 4 , 1980)

Before MORGAN, REAVLEY and HATCHETT, Circuit Judges.

PER CURIAM:

Sawyer Lewis was convicted by a jury of possession of heroin with intent to distribute in violation of LA. REV. STAT. ANN. § 40:966 (West Supp. 1979) and sentenced by the court to life imprisonment without benefit of parole. Lewis filed a petition for a writ of habeas corpus in the trial court alleging ineffective assistance of counsel. After conducting an evidentiary hearing, the trial court denied the writ. Lewis' habeas petition to the federal district court was also denied. We affirm.

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The standard for judging the effectiveness of retained counsel is set forth in Fitzgerald v. Estelle, 505 F.2d 1334, 1338 (5th Cir.), cert. denied, 422 U.S. 1011 (1975):

> In sum, whenever the actions of retained counsel operate to deprive the trial of fundamental fairness then the Fourteenth Amendment due process had been violated notwithstanding any kind of specific involvement by a particular state official. If a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown.

Thus, to establish a denial of the sixth amendment right to counsel where defendant retained his own counsel requires a showing of either (1) that retained counsel's performance was "so grossly deficient as to render the proceedings fundamentally unfair" or (2) that retained counsel's incompetence is so apparent that a reasonably attentive official of the state should have been aware of it and could have corrected it. Id.; United States v. Childs, 571 F.2d 315 (5th Cir. 1978); Howard v. Henderson, 519 F.2d 1176 (5th Cir.), cert. denied, 423 U.S. 1036 (1975).

After discovering heroin in Lewis' coat, two uniformed officers arrested him. Lewis was not wearing his coat at the time of search--his coat had been lying unattended in a booth. A pat-down of Lewis after his arrest uncovered additional heroin concealed on his person.

Lewis claims that he was denied effective assistance of counsel because no motion to suppress this evidence was filed. Although the record indicates that counsel had prepared a motion to suppress, it does not disclose his reasons for not filing it. If counsel erred in failing to file the motion, we hold that this error does not compel a finding of fundamental unfairness.

The right to effective assistance of counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974), citing MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir.), modified on other grounds, 289 F.2d 928 (5th Cir.), cert. denied, 368 U.S. 877 (1961). Mere errors of judgment or a mistaken choice of strategy by an attorney is insufficient to support a finding of lack of effective assistance of counsel in a constitutional sense. Coco v. United States, 569 F.2d 367, 368-71 (5th Cir. 1978); Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975).

Counsel was retained and met with his client more than a month before trial. Additionally, counsel hired an investigator who discovered petitioner's arrest record. The record on appeal reflects that counsel cross-examined the state's witnesses and objected to the introduction of evidence during the course of the trial. Finally, counsel testified at the state court habeas hearing that it was petitioner and not counsel who decided that petitioner would not testify in his own behalf at trial. The record does not demonstrate that petitioner had a trial so fundamentally unfair as to violate his rights to due process under the fourteenth amendment.

Finally, the record fails to demonstrate that petitioner's counsel was so blatantly ineffective that the Louisiana trial court or any one of its responsible officials knew or should have known that Lewis was receiving inadequate representation. Loftis v. Estelle, supra.

The petition for the writ of habeas corpus is denied and the decision of the district court is affirmed.

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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SAWYER LEWIS — NO. 77-3577

Versus — CIVIL ACTION

LOUISIANA STATE PENITENTIARY — SECTION "E"

JUDGMENT

The Court having, on December 22, 1978, denied the application of Petitioner for Writ of Habeas Corpus;

IT IS ACCORDINGLY, ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Louisiana State Penitentiary, and against Sawyer Lewis, Petitioner, dismissing the latter's application as aforesaid.

New Orleans, Louisiana, this 26th day of December, 1978.

UNITED STATES DISTRICT JUDGE

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APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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SAWYER LEWIS

versus

LOUISIANA STATE PENITENTIARY

CIVIL ACTION

NUMBER 77-3577

SECTION E (4)

REPORT AND RECOMMENDATION

Sawyer Lewis is a state prisoner, presently incarcerated in the Orleans Parish House of Detention in New Orleans, Louisiana. He is serving a life sentence, without benefit of parole, imposed by the Honorable Charles R. Ward, Criminal District Court Judge, Parish of Orleans, after being convicted by a jury on February 28, 1977, of possession of heroin with intent to distribute, in violation of La. R.S. 40:966.

Lewis is now before this Court on his application for a writ of habeas corpus. He seeks relief on the grounds that he was denied due process of law and effective assistance of retained counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

Although petitioner chose not to appeal his conviction and sentence to the Louisiana Supreme Court, he filed a petition for a writ of habeas corpus in the trial court alleging ineffective assistance of counsel. After conducting an evidentiary hearing, Judge Ward denied petitioner relief. The Louisiana Supreme Court denied Lewis' application for writs of certiorari, mandamus and prohibition. State of Louisiana v. Sawyer Lewis, 352 So.2d 236 (La. 1977). Thus, petitioner has exhausted his state remedies and is properly before this Court. Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509 (1971); Brinks v. Georgia, 512 F.2d 673 (5th Cir. 1975); 28 USC 2254(b).

The state transcripts of the preliminary hearing, the trial and the evidentiary hearing as well as the duplicate records

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of the Louisiana Supreme Court are before this Court and no federal evidentiary hearing is required. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

The record reflects that shortly after petitioner was arrested, a preliminary hearing was conducted. The testimony adduced at that hearing shows that on December 29, 1976, at approximately 6:30 p.m. Officers Warren Keller and John Marie, Jr., of the New Orleans Felony Action Squad, who were making a routine wanted check for a suspected armed robber by the name of Lincoln Lewis (no relation) approached the Streamline Tavern in the 3200 Block of Fern Street, New Orleans, Louisiana. They observed several black males loitering outside. As they alighted from their unmarked car, they saw petitioner enter the tavern in a "hurried" manner. Officer Marie followed Lewis into the bar, observed him run to the right side of the room, reach into a booth, grab a jacket, place something inside the "left" front pocket, "discard" the jacket into the booth and walk away. Officer Marie then walked over to the jacket and looked into the "right" front pocket "figuring defendant might have threw (sic) a gun in there. It's a heavily narcotics traffic bar, many gun arrests have been made there." Although no gun was found, Marie testified that he found two ballons: one tied in a knot and one ripped open on the side. Further search of the jacket revealed loose tin foil packets along with a Public Service bill, loose keys and some change. (Tr. of Prel. Hear. pp. 2-17)

After Officer Marie retrieved the jacket and informed his partner of its contents, petitioner, who was now standing next to the jukebox several feet away, was instructed to walk outside. Once outside, Lewis was frisked for weapons. Officer Marie, after examining the remaining jacket pockets and the contents of the tin foil packets containing a brown powder which he believed to be heroin, placed petitioner under arrest. (Tr. of Prel. Hear. pp. 2-18)

At the trial, the testimony of the arresting officers was substantially the same except that Officer Marie testified that he first searched the "right" front pocket and not the "left" as was testified to at the preliminary hearing. (Tr. p. 43)

The record reflects that although counsel did not file a motion to suppress this evidence, he did object to its introduction during the course of the trial. (Tr. pp. 46-49)

Lewis attacks his conviction on the grounds that the conduct of his retained counsel violated his right to effective assistance of counsel in that he failed to adequately prepare his case for trial, to cross-examine adverse witnesses and object to leading questions at trial. However, the gravaman of Lewis' contentions is that his conviction was based solely on the testimony of police officers conducting an illegal search and the introduction of illegally seized evidence, yet counsel failed to file a motion to suppress this evidence or call petitioner as a witness in his own behalf.

The standard for judging the effectiveness of retained counsel is set forth in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975) (en banc):

> "The sum, whenever the actions of retained counsel operate to deprive the trial of fundamental fairness then the Fourteenth Amendment due process has been violated notwithstanding any kind of specific involvement by a particular state official. If a retained counsel's actions do not sap the proceedings fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown."

Thus, to establish a denial of the Sixth Amendment right to counsel where defendant retained his own counsel requires a showing of either (1) that retained counsel's performance was

"so grossly deficient as to render the proceedings fundamentally unfair" or (2) that retained counsel's incompetence is so apparent that a reasonably attentive official of the state should have been aware of it and could have corrected it. Fitzgerald v. Estelle, supra; Howard v. Henderson, 519 F.2d 1176 (5th Cir. 1975); United States v. Childs, 571 F.2d 315 (5th Cir. 1978).

However, the right to effective assistance of counsel under the Sixth and Fourteenth Amendments does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Howard v. Henderson, supra; Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) citing McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied 268 U.S. 877, 82 S.Ct. 121 (1961).

Lewis' claims as to the conduct of counsel during the course of his trial are without merit. The preparation evidenced by the actual time spent with petitioner prior to trial is not indicative of the quality of the defense presented at trial. Herring v. Estelle, supra. The record reflects (and the testimony of the prosecuting attorney and other witnesses at petitioner's state court habeas hearing substantiate, Tr. pp. 61-63) that counsel engaged in skillful and vigorous cross-examination of the State's witnesses and made numerous and appropriate objections during the course of the trial. Additionally counsel testified that it was petitioner and not counsel who decided that petitioner would not testify in his own behalf at the trial of this matter. (Tr. p. 44)

There is nothing in the record to suggest that defendant had a trial so fundamentally unfair as to violate his rights to due process under the Fourteenth Amendment.

Under Louisiana law, a defendant who fails to timely file a motion to suppress evidence is deemed to have waived any objection to the admissibility of the evidence on the grounds of an infirmity in the search and seizure. La. CCP 703; State v. Womack, 283 So.2d 708 (La. 1973). An objection at trial or on appeal comes too late. State v. Lawrence, 255 So.2d 729 (La. 1971). State v. Jenkins, 340 So.2d 157 (La. 1976).

Additionally, failure to follow prescribed state procedural rules can foreclose habeas review absent a showing of both cause for the default and actual prejudice resulting from it. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).[1/]

The record reflects that defendant's counsel was aware of the facts and the law (Article 703 of the Louisiana Code of Criminal Procedure and the relevant constitutional objection that might be made) and made a deliberate decision not to file a motion to suppress because in his professional judgment, the motion was unfounded. (Tr. pp. 28-47)

[1/] See O'Berry v. Wainwright, 546 F.2d 1204 at 1216 (5th Cir. 1977) holding that the Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d (1976) requirement that the State provide an "opportunity" for full -- and fair litigation of a Fourth Amendment claim is satisfied where the state court is faced with the claim and chooses to resolve it on an independent, adequate, non-federal state ground.

See also LiPuma v. Comr's Dept. of Corr., State of N.Y., 560 F.2d 84 at 93, n. 6 (2nd Cir. 1977) cert. denied ____ U.S. ____, 98 S.Ct. 189 holding that Stone precludes federal habeas review of a Sixth Amendment claim, where the basis thereof is an alleged Fourth Amendment violation fully and fairly considered by the state courts and U.S. ex rel Carbone v. Manson, 447 F.Supp. 611 at 617 (D. Conn. 1978) precluding habeas review of an alleged Fifth Amendment violation where its resolution would require relitigation of a Fourth Amendment issue.

At the hearing on petitioner's writ of habeas corpus, counsel testified that the District Attorney's Office had opened its file to him and after a review of that file and based upon discussions with his client, he did not think any pre-trial motions were warranted. (Tr. pp. 29, 46) He also testified that based upon certain portions of the transcript of the preliminary hearing alone, he did not think the police had probable cause to follow Lewis into the bar, but did have a right to go into the bar and search the coat because it had been abandoned. (Tr. pp. 37-39) Although counsel prepared a motion to suppress, he decided not to file it after consulting with Lewis who told him he didn't go near the coat or put anything in it and that it was the police who walked over to the coat and put something into his pocket. This was a completely different story from that which came out at the preliminary hearing and in counsel's opinion, based upon a review of the District Attorney's file, a review of the preliminary hearing and discussions with his client, it would have been a breach of his professional responsibilities to file a motion so frivolous and misleading. (Tr. pp. 39-42)

Mere errors of judgment or a mistaken choice of strategy by an attorney is insufficient to support a finding of lack of effective assistance of counsel in a constitutional sense. Coco v. United States, 569 F.2d 367 (5th Cir. 1978); United States v. Meyer, 417 F.2d 1020 (8th Cir. 1969); Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975).

However, assuming arguendo that petitioner's counsel was less than reasonably effective, the record fails to demonstrate that petitioner's counsel was so blatantly ineffective that the Louisiana trial court or any one of its responsible officials knew or should have known that Lewis was receiving inadequate representation. Loftis v. Estelle, supra; United States v. Garza,

563 F.2d 1164 (5th Cir. 1977); Alverez v. Wainwright, 522 F.2d 100 (5th Cir. 1975).

In view of the foregoing, Lewis' petition for writ of habeas corpus should be dismissed.

RECOMMENDATION

It is recommended that the petition of Sawyer Lewis for a writ of habeas corpus be dismissed.

New Orleans, Louisiana, this 30th day of November, 1978.

Respectfully submitted,

Veronica D. Wicker

VERONICA D. WICKER
United States Magistrate

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APPENDIX E

Supreme Court of Louisiana

NEW ORLEANS, 70112

STATE OF LOUISIANA — Novmeber 23, 1977

V.

SAWYER LEWIS — NO. 60,817

- - - - - -

In re: Sawyer Lewis applying for writs of certiorari, mandamus and prohibition

- - - - - -

Writ denied. We cannot say the ruling was incorrect.

/s/ PFC

/s/ JWS

/s/ FWS

/s/ JAD

/s/ WFM

TATE, J., is of the opinion the writ should be granted.

DENNIS, J., is of the opinion the writ should be granted. In view of the facts that the defendant was faced with a life sentence, without parole etc., which he subsequently received, and that the state's case was based upon an apparent illegal seizure which the defendant's attorney failed to move to suppress, the defendant was denied effective assistance of counsel.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
November 23, 1977

Frans J. Labranche, Jr.
Deputy Clerk

APPENDIX F

STATE OF LOUISIANA — CRIMINAL DISTRICT COURT

VERSUS — PARISH OF ORLEANS

SAWYER LEWIS — SECTION "A", CASE 257-998

Transcript of trial on the merits heard February 28th, 1977, in the above named and numbered matter, before the HONORABLE CHARLES R. WARD, Judge presiding.

APPEARANCES:

NICK NOREA, ESQ.
ASSISTANT DISTRICT ATTORNEY
REPRESENTING THE STATE OF LOUISIANA

GEORGE E. MOULEDOUX, ESQ.
COUNSEL REPRESENTING DEFENDANT

REPORTED BY:

ELLIS M. GILL
OFFICIAL COURT REPORTER

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I N D E X

STATE WITNESSES	EXAMINATION BY:	PAGE
Philip Aviles	Direct, Mr. Norea	3
Warren Keller	Direct, Mr. Norea	12
	Cross, Mr. Mouledoux	24
John F. Marie	Direct, Mr. Norea	29
	Cross, Mr. Mouledoux	38
	Re-Direct, Mr. Norea	45
Frank Ben	Direct, Mr. Norea	49

State and Defense Rests.....63

* * * *

EXHIBITS

S-1, evidence envelope.....46

S-2, sheet of paper with 25 tin foil packets and a balloon attached thereto.....46

S-3, sheet of paper with 19 tin foil packets and a balloon attached thereto.....46

S-4, a sheet of paper with five tin foil packets attached thereto.....46

S-5, a jacket.....47

S-6, four keys and two New Orleans Public Service, Inc. bills.....48

S-7, a driver's license and an envelope containing $40.....48

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(No objections noted by Counsel for Defense during voir dire examination or opening statement by the State.)

BY THE COURT:

Call your first witness, Mr. Norea.

BY MR. NOREA:

Philip Aviles.

PHILIP AVILES, who, having been duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. NOREA:

Q State your name, please?

A Philip Aviles.

Q How are you employed?

A Criminalist with the New Orleans Police Department.

Q How long have you been a criminalist?

A Approximately three years.

BY MR. NOREA:

At this time, the State is going to attempt to qualify Officer Aviles as an expert in the field of identification of a controlled dangerous substance, particularly heroin.

DIRECT EXAMINATION BY MR. NOREA:

Q How long have you been with the Crime Lab?

A Three years approximtely.

Q During that period of time, have you had occasion to identify controlled dangerous substances?

A I have.

Q How many, particularly heroin?

A I really have no idea of the number of times. A total number of cases is well over five hundred.

Q When you first started, did you ever receive any special training in the field of identifications of controlled dangerous substances, particularly heroin?

A Yes. I did on-the-job training with the department. And since I have been with the department, I attended schools. One drug enforcement administration school in Maklene (phonetic spelling), Virginia on analysis of controlled dangerous substances. And Gulf South Research Institute School on gas chromatography related to separation of various compounds, relating to controlled dangerous substances.

Q What is the extent of your formal education?

A Bachelor of Science Degree.

Q Where did you receive that?

A South Eastern in Hammond, Louisiana.

Q And which curriculum did you take?

A Biological sciences.

Q In college, did you take any courses in chemistry?

A Yes, I did.

Q How many courses did you take in chemistry?

A Five courses, I believe, altogether.

Q Do you know the total amount of hours of college credits you have in chemistry?

A Approximately twenty semester hours.

Q Back to the job training, when you first started with the Crime Lab, with the Police Department Crime Lab, did you work under anyone's supervision?

A Yes, I did.

Q Whose supervision?

A When I first started, I worked under the supervision of Mr. Walter Stratta.

Q To your knowledge, has he ever been qualified as an expert in the field of controlled dangerous substances particularly heroin?

A Yes, he has.

Q When you first started, did he, as the supervisor, have occasion to check your results, your chemical results of evidence?

A Yes, he did.

Q Now, did his results differ from your results?

A Not in the final reports, no, sir.

Q Have you ever had the occasion to examine

substances which purported to be heroin and the results were negative?

A Yes, sir.

BY MR. NOREA:

Your Honor, I tender him over.

BY MR. MOULEDOUX:

No questions.

DIRECT EXAMINATION BY MR. NOREA:

Q Have you ever been qualified as an expert in the field before?

A Yes, I have.

Q What sections of Court?

A All sections of Criminal District Court, Orleans Parish, Criminal District Court Plaquemine's Parish and Juvenile Court in Orleans Parish.

Q Have you ever been refused qualifications?

A No, sir.

BY MR. NOREA:

I tender on the predication.

BY MR. MOULEDOUX:

No questions, Your Honor.

BY THE COURT:

All right. I find the witness to be an expert. And as an expert may give an opinion to the jury relative to his analysis of substances, particularly

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qualitative and quantitative composition.

Ladies and gentlemen, usually a witness is precluded from giving an opinion to the jury. When a witness is found to be an expert, an exception is made. Therefore, I find that this witness to be an expert. And I am going to permit him to give to you his opinion.

DIRECT EXAMINATION BY MR. NOREA:

Q Officer, did you bring any evidence with you to Court this morning?

A Yes, I did.

Q What did you bring?

(Witness produces an envelope.)

Your Honor, I mark this large envelope for identification as S-1.

Where have you been keeping S-1?

A That has been in the safe at the Crime Labratory.

Q How long has it been in the safe in the Crime Labratory?

A Since I received it on December 30th, 1976.

Q From whom did you receive it?

A Officer Jimmy Lewis, Narcotic's Division.

Q Describe for the jury the exact condition that envelope was in when you first received it?

A When I first received it, it was sealed. And it

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had been sealed on all openings here with the evidence tape that you see across the back. And it did not have this tape across the front. This is where I sealed it following my analysis.

Q Was there any writing on the envelope when you received it?

A Yes. The writing you see on the front was on here when I received it. I filled it out the bottom at the time I received it.

Q What did you do with the envelope after you received it?

A After I received it, we have, well, in the laboratory, we have an evidence book that we log all evidence coming into the laboratory. And I logged this envelope, the contents of this envelope in the book. And then placed it in the safe until the analysis.

Q What date did you perform the analysis on?

A It was on the tenth of January, '77.

Q Okay. And how did you get into that envelope to find the substance?

A I simply made an incision right across the top of the envelope here.

Q Officer, would you open that envelope now, please?

A Sure.

Q I will mark these S-2. This one envelope right

here with the blue, I mean the pink baloon. This one is S-3; this other one is S-4.

Look at S-2. Did you perform any chemical analysis on S-2?

A Yes, sir, I did. Where you see my initials P. A. next to this small piece of foil, these are the pieces of foil that I analyzed. And also on the other.

BY THE COURT:

Give Mr. Mouledoux an opportunity to examine the contents before you proceed. (Counsel complies.)

DIRECT EXAMINATION BY MR. NOREA:

Q Talking about S-2, what condition was S-2 when you removed it from the envelope?

A It was as you see it here, with the exception of my initials. It was just as you see it.

Q With respect to S-2, how many papers did you examine off of S-2?

A I examined five. One from each row; one from each horizontal row of foil.

Q What was the results, you're finding on those five?

A Positive for the presence of heroin.

Q I will show you what's been marked previously as S-3. What condition was S-3 when you removed it from the envelope?

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A As you see it now, with the exception of my initials.

Q How many papers off of that, S-3, did you examine?

A I, again, I examined one from each horizontal row.

Q What were the results of your finding?

A Positive for the presence of heroin.

Q I would like you to look at S-4. What condition was S-4 when you found it?

A Again, as you see it on the paper, without my initials.

Q Did you examine those?

A I examined all five of these, yes, sir.

Q What were the results of your findings?

A Positive for the presence of heroin.

Q How come you didn't examine all of these papers on S-2 and S-3?

A Laboratory procedure is that we examine a representative sample. In my case or in my opinion, a representative sample, random sample, would be one foil from each row of foil. And with usually a minimum of four or five foils per page.

Q Now, is there any doubt in your mind of these, I believe, fourteen papers of heroin that you sampled out of this whole group, any doubt in your mind that is heroin?

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A No doubt at all.

BY MR. NOREA:

Tender.

BY MR. MOULEDOUX:

No questions, Your Honor.

BY THE COURT:

Any further need of this witness?

BY MR. NOREA:

No, sir.

BY THE COURT:

You're excused. You may leave.

BY MR. NOREA:

I offer this stipulation to the Defense--

BY THE COURT:

No. If you tell the stipulation in Open Court, it would be, in my opinion, a violation of the rules of evidence.

Call your witness.

BY MR NOREA:

I call Sheila Myers.

BY THE COURT:

I will not permit Miss Myers to testify.

BY MR. NOREA:

Call Warren Keller.

For the record: I would like to call Jimmy Lewis.

BY THE COURT:

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As soon as Mr. Keller takes the stand, I will have his name called.

WARREN KELLER, who, having been duly sworn by the Minute Clerk, testified as follows:

BY THE COURT:

All right, Sheriff, step into the foyer and ask if Jimmy Lewis is present today. (The Deputy Sheriff complies with a negative response.)

All right, the witness's name was called and he is not present in Court or the foyer.

Okay. Let's proceed.

DIRECT EXAMINATION

BY MR. NOREA:

Q State your name, please?

A ~~Warren Keller.~~

Q How are you employed?

A New Orleans Police Department.

Q How long have you been employed on the Police Department?

A Six years.

Q You assigned to any particular unit now?

A Felony Action Squad.

Q How long have you been in the Felony Action Squad?

A Four years.

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Q I direct your attention to December 29th, 1976, that particular date, who was your partner?

A Police Officer John Marie.

Q Did you have occasion to go to the 3200 block of Fern Street?

A Yes, I did.

Q Officer, for what reason did you proceed to the 3200 block of Fern Street?

A On December 29th, early that day, we had spoke to Detective Raymond Reed of the Robbery Division. Detective Reed informed--

BY MR. MOULEDOUX:

I object to that.

DIRECT EXAMINATION BY MR. NOREA:

Q As the result of your conversation with Detective Reed, what did you do?

A We went to the Girt Town area where 3200 block of Fern is located, to look for a subject, Lincoln Lewis, wanted for armed robbery.

Q Do you know, was Lincoln Lewis, that's not Sawyer Lewis; is that right?

A That's right.

Q When you got there, what happened; anything unusal happened? Do you know the name of this bar?

A The last place we had seen Lincoln Lewis was the Streamline Tavern located at 3235 Fern. At

this time, approximately 6:30 P. M., we proceeded to that location. As we drove up in front of a tavern, several black males were standing in front of the tavern. One subject, in a hurriedly fashion, went inside of the lounge. Officer Marie and myself both exited the vehicle--

Q Who was driving?

A I was driving. We were proceeding in a downtown direction. The doorway to the lounge was on Officer Marie's side of the car. We exited the vehicle and we went inside the location. As I got inside the location, inside the tavern, I observed the black male that had ran inside the bar standing next to one of the booths holding a brown, leather type jacket in his hand.

Q What did he do with that brown, leather type jacket?

A He placed the jacket, just dropped it onto the booth. Walked past me; went to the jukebox which was located to the left of the doorway.

Q Now, where was Officer Marie when you saw this going on?

A Officer Marie was in front of me. He had went into the doorway right before me. And after

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the subject dropped the jacket, Officer Marie went over to the jacket and picked it up.

Q What did the subject do after he dropped the jacket?

A He dropped the jacket into the booth, walked past Officer Marie and myself, stood by the jukebox and was leaning against the jukebox.

Q From what you observed, could you tell if he was taking anything from the jacket or putting anything into the jacket?

A No.

Q When he walked in front of you, did he have anything in his hands?

A No, he did not.

Q Did you see him put anything in his pocket?

A No, I did not.

Q Did you recover anything from the jacket pocket?

A (No response by the witness.)

Q Did Officer Marie?

A Yes, sir, he did.

BY MR. MOULEDOUX:

Objection, unless he saw him do this.

EXAMINATION BY THE COURT:

Q Did you observe Officer Marie examine the jacket?

A Yes, I did.

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Q Tell us what you observed when you saw him examine the jacket?

A As Officer Marie picked up the jacket, he walked past me. And he advised me that was a 962, which is the police code for narcotics. We approached the subject, Sawyer Lewis, who was leaning against the jukebox, identified ourselves as police officers, took the subject outside to where our police car was so there wouldn't be any type of confrontation in the lounge with the other patrons. As we got by the car, we frisked the subject for any weapons. Officer Marie than began a checking the jacket for any further evidence. At which time from the lower, left jacket pocket, he removed two balloons, the type a child would play with. One was a pink balloon. It was tied in a knot at the time. And it had a contents in it, which, you know, we hadn't opened at that time. The other balloon was an orange balloon. It was ripped open on the bottom. And it contained, later, after we counted them, 19 aluminum foil packages. Also, in the jacket pocket were five loose aluminum foil packages of which one of them Officer Lewis opened up.

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And he examined it. And found it to contain-

Q When did he open it? He didn't open the balloon, did he, at that time?

A No. The balloon was already opened much like I say, it was ripped open on the side or bottom area. And you could see inside the balloon the aluminum packages. Inside the jacket pocket, there were five loose aluminum foil packages. Officer Marie opened up one of these and found a brownish brown powder which we believed to be heroin.

Q Which pocket are you talking about; do you remember which pocket?

A The lower, left jacket pocket.

Q Was there anything else besides the balloon of heroin in that pocket?

A Also in the side pocket was a New Orleans Public Service envelope which contained a utility and receipt bill in the name of Sawyer Lewis.

Q Was there anything else you found in that pocket?

A There was a set of keys, forty-three cents in change.

Q Now, did Officer Marie in your presence look in any of the other pockets of the jacket?

A Checked the top, left pocket. And inside the

top, left pocket was a Louisiana Driver's License in the name of Sawyer Lewis. Also, forty dollars in U. S. currency wrapped around the driver's license.

Q Did you see the person in Court holding that coat that he threw down?

A Yes.

Q Would you point him out now to the jury?

A The defendant before the bar.

Q How is he dressed today?

A He has a tan, leather type jacket with what appears to be a maroon shirt.

BY MR. NOREA:

Let the record reflect he identified the defendant, Sawyer Lewis.

DIRECT EXAMINATION BY MR. NOREA:

Q After Officer Marie recovered the evidence, what did y'all do?

A We advised the subject Lewis of his rights, placed the subject, we handcuffed him and placed him in the rear of the police car. We continued conducting the search of the other pockets after we had the subject under arrest and found nothing in the other pockets. At this time, we transported the subject to the Narcotic's Division, at which time the evidence was turned over to

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Officer Lewis.

Q You turned the evidence over to Officer Lewis?

A Officer Marie turned over the evidence to Officer Lewis.

Q Was it done in your presence?

A Yes, it was.

Q I show you what I marked for identification as S-1. You recognize that envelope?

A This is the envelope that Officer Lewis placed the narcotics in.

Q Did you see him place the narcotics in there?

A Yes, I did.

Q Did you do anything with the narcotics before it was placed in this envelope?

A We dated and initialled the narcotics in the presence of Officer Lewis and then turned it over to him.

Q Would you describe to the jury how you dated and initialled the narcotics?

A How we dated and initialled? It's putting your initials on the evidence, you put the date that we received the evidence. In my case, I used my initials which were W. J. K.

Q I would like you to look at what has been marked for identification as S-2. Do you recognize that?

A This is the paper that we initialled and dated.

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And this is the evidence, the aluminum foil packages.

Q Who opened the pink balloon and put those packages on the tape?

A I opened it.

Q Who put the scotch tape over those aluminum foils?

A Narcotic's Division. Officer Lewis.

Q Done in your presence?

A Yes, it was.

Q I would like to show you what's been marked for identification as S-2. Do you recognize that?

A This is the orange balloon with the aluminum foil packages found inside the balloon which were dated and initialled by myself.

Q Your initials appears on S-3 also?

A Yes, it did.

Q I will show you S-4. Do you recognize S-4?

A This is the five, loose, aluminum foil packages inside of the jacket which I dated and initialled.

Q What was done with S-2, 3 and 4?

A After they were dated and initialled, they were placed inside of the brown envelope by Officer Lewis.

Q Did you observe Officer Lewis seal that envelope?

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A Yes, I did.

Q How did he seal it?

A With the red type evidence tag.

Q Put these three?

A Right.

I show you what's been marked for identification as S-4. You recognize S-4?

A This is the leather jacket that we had taken out of this Streamline Tavern that I observed the defendant drop to the booth. This is the evidence tag that Officer Marie and myself filled out in the Felony Action Squad Office.

Q This is the same jacket that you saw the defendant?

A That's the tag we placed on it.

Q I show you what's been marked for identification as S-6. Count these keys in with S-6.

A These are the keys we removed from the lower, left part of the jacket pocket. Inside here is a New Orleans Public Service bill, electric, for the address of 522 South Lopez Street. This is the utility bill for the same address, 522 South Lopez, in the name of Sawyer J. Lewis.

Q What pocket was this removed from?

A From the lower,left jacket pocket.

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Q Same pocket that the heroin was removed from?

A Yes, it was.

Q I show you S-7 in globo.

A This is the Louisiana Driver's License by the name of Sawyer Lewis that we removed from the top jacket pocket. Inside this envelope--want me to open it?

Q Yes.

A Should be forty dollars in U. S. currency. I believe one twenty and ten and ten ones.

Q Now, where did the change come from?

A The thirty-four cents was in the lower, left jacket pocket.

Q Officer Marie maintained this in his possession?

A Yes, he did.

Q What did he do with it?

A That was placed on the evidence book at the Felony Action Squad Office.

Q These events occur in Orleans Parish?

A Yes, it did.

Q You are positive this is the man that put that coat down in the barroom that day?

A Yes, I am.

Q When he put that coat down, was there anyone else around him?

A No one else.

Q Could you tell the ladies and gentlemen of the

jury the general layout of the bar at 3235 Fern Street?

A As you walk in the doorway, to the immediate left is a jukebox. And there's a bar, I guess you would say an L-shape bar, it starts to your left and it goes down the floorway. To your right, there's, I think, it's just two booths and several tables, and, I think, they have like a little, small dance floor.

Q When the defendant put this down in the booth, was anyone in the booth-table area?

A No.

Q How would you describe that area, the booth and table area, when you observed it with respect to other people being there?

A There was no one else arcund. They only had customers at the bar itself.

Q Okay, now, when you observed this coat, was any other coats in the table area?

A No, there was not.

Q Pardon?

A There was none at all.

BY MR. NOREA:

I tender the witness.

BY THE COURT:

Cross examination.

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CROSS EXAMINATION

BY MR. MOULEDOUX:

Q Officer Keller, when you drove up to the place, how many males were standing out in front of it?

A They had several subjects standing in front.

Q What's "several"? Ten?

A I would say around four or five.

Q And what were the lighting conditions at this time?

A It's fairly good lighting out in front of the location.

Q That was natural lighting from the sunshine?

A No. They have, I think, a beer sign that's lit up. Also, the light.

Q Between you and Officer Marie, which one went inside first?

A Officer Marie.

Q And how far behind him were you?

A Just a few feet.

Q Who, between you and Officer Marie, went over to the jacket area first? Where the jacket was on the booth, who went there first, you or Officer Marie?

A Officer Marie.

Q And you stated that you didn't see anyone, see the defendant put anything in the pocket?

A I seen him holding the jacket. I didn't see him put anything in it, no.

Q You didn't see him put anything in his hands you testified earlier?

A That's right.

Q How many people were in the Tavern at the time you went in?

A I have no idea really. I would say anywhere from ten or more, something like that.

Q Could there have been as many as twenty-five, forty?

A No, I don't think that many.

Q Not that many. Had you ever seen the defendant before the evening of the arrest?

A Date of the arrest was the first time I seen the defendant.

Q Do you regularly work in this district of town?

A We work in all areas of the city. We cover the whole city.

Q Do you know anything about the narcotic activity in this area of a personal knowledge?

A Yes, I do.

Q Is it a narcotic free area or heavy narcotic area?

A It's a heavy narcotic area.

Q What part of town is this?

A This is, as far as police district, it's the

second district. That area is called the Girt Town.

Q What are the general boundaries of Girt Town?

A They have Carrolton Avenue, Earhart Blvd., Washington Avenue and Jefferson Davis, I believe cuts through the back.

Q Who examined the jacket first?

A Officer Marie.

Q Did you watch him while he was examining it?

A Yes, I did.

Q And I think you testified that the evidence that was shown to you as S-6 and S-7 which was described as the Public Service envelope and the keys and the driver's license and the envelope, the money now in this envelope, were found in the left, front pocket?

BY MR. NOREA:

I object to the question. It's the left, front pocket.

BY THE COURT:

I think you are testifying.

Be more specific, though.

You can exhibit it if you wish. But do not testify.

BY MR. NOREA:

I think they are all up there.

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CROSS EXAMINATION BY MR. MOULEDOUX:

Q This envelope right here, Officer, which is marked S-7. That was in S-6, I think it was the keys and a NOPSI bill, and then these items here, this is part of this one here, I think, this exhibit and this change here. Where did you find S-6, which will be this here, the Public Service bill and keys?

A In the lower, left jacket pocket.

Q Where did you find the evidence that is marked S-7 in?

A In the top, left jacket pocket.

Q Officer, didn't you testify a few minues ago you saw S-7 and S-6, it was taken out of the lower, left pocket?

A No, I did not.

Q Did you just say the left pocket?

A The driver's license and money were found in the top, left jacket pocket.

Q My question is: Didn't you tesitfy earlier you found it in the left pocket?

A No, I did not.

BY MR. MOULEDOUX:

Your Honor, could we go back to that part of his testimony and check what the Officer said?

BY THE COURT:

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Not at this time, Mr. Mouledoux.

I would rather let the jury rely on their memory.

CROSS EXAMINATION BY MR. MOULEDOUX:

Q When did you first search the jacket?

A I didn't search the jacket at all.

BY MR. MOULEDOUX:

Then, again, Your Honor, I want to go back to another question he answered earlier.

BY THE COURT:

I think the jury can rely upon their memory, Mr. Mouledoux. The jury has paid close attention to the testimony. The jury will know whether or not it's been consistent.

BY MR. MOULEDOUX:

I have no further questions of this witness, Your Honor.

BY MR. NOREA:

No further questions.

BY THE COURT:

Thank you, Officer. You're excused. Do not discuss your testimony with anyone, Officer. Remain outside.

BY MR. NOREA:

Judge, as far as I'm concerned, he can be

excused from the subpoena.

BY THE COURT:

I want this Officer to remain outside.

JOHN F. MARIE, JR., who, having been duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. NOREA:

Q State your name, please?

A John F. Marie, Jr.

Q How are you employed?

A Police Officer, New Orleans Police Department.

Q How long have you been a Police Officer?

A Seven years.

Q Are you assigned to any particular units?

A Yes, sir, Felony Action Squad.

Q How long have you been in the Felony Action Squad?

A Since it's inception in September of 1972.

Q I direct your attention to December 29th, 1976, did you have a partner on that day?

A Yes, sir, Officer Warren Keller.

Q Same Officer that just testified?

A Yes, sir.

Q Now, about six:thirty in the evening, what were you doing at six:thirty in the evening?

A At six:thirty that afternoon, we were going to a Streamline Lounge located in the 2200 block

of Fern Street. Went there looking for the man wanted for armed robbery.

Q Tell the ladies and gentlemen of the jury the name of that man wanted for armed robbery?

A Lincoln Lewis. He is a well known police character. The last time we stopped Lincoln, he was at the Streamline Bar. We got the "wanted" out that morning and understood he was at the Streamline Bar.

Q Did you locate him there?

A No, we did not.

Q Tell the jury, what, if anything, you know happened at the time you approached the Streamline Bar?

A As we were coming into the Streamline Bar, there were several males standing in front of the bar casually loitering in the front. As we pulled up in an unmarked police car, I observed the defendant before the bar, Sawyer Lewis, unknown to me at that time, just another man in front of the bar. He looked at our police car and appeared to be excited about something, nervous about something. He darted quickly into the barroom. I was on the passenger's side of the vehicle closer to the bar. I alighted from my police vehicle and pursued.

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Mr. Lewis just to see what he was up to. As I entered the bar, I observed Mr. Lewis run to the right side of the bar. At that side of the bar, there's one or two booths and then a partitioned area for tables or maybe couples, the way the bar is arranged. I observed Mr. Lewis shove something in a coat pocket, a tan looking coat, I observed him shove something in the coat pocket and look at me in my face, and throw the coat into the booth and walk right past me.

Q Where was Officer Keller?

A He was in the doorway. He ran behind me when I told him, I said, "That guy is going for something." Then, my partner exited the police car and ran behind him. At that time, he was in the doorway.

Q In that particular area, then, Sawyer Lewis ran, was anyone else in that particular area of the bar?

A That particular area, no, sir. Like I say, it's a, it's a partitioned area and a couple of booths and tables and no one at all in the barroom was on that side of the barroom. The only customers that were in the barroom were seated at the bar.

Q Could you describe this area as vacated where

the defendant was?

A Yes, sir.

Q What did you do after that, Officer?

A Immediately went to the coat thinking that there might have been a pistol or contraband or something. I was more worried for my safety, so to speak than I was what the defendant had. As I examined the coat for a weapon, he walked right past me. I looked for his hands to make sure that his hands were fully exposed. He didn't have a pistol. I walked to the coat and inspected the pocket I saw him going into. As I reached in the pocket, I found two balloons. Now, these balloons were small and rolled up and tied. And inside the balloons were some content. One of the balloons, was a pink one and orange one. The orange balloon was partially ripped open. And I could see pieces of tin foil. It's a common way of packaging heroin and other narcotics. I also looked in the pockets and there was five, loose pieces of tin foil alongwith a Public Service letter and loose keys and some change. I immediately retrieved the coat. Nobody went by it except the defendant. I

immediately retrieved the coat and went back to my partner standing in the doorway of the barroom and motioned to him to get the defendant, Sawyer Lewis. I told him we have a 962, a signal 962, which refers to narcotics violations. Because we didn't want to cause any disturbance, we asked the defendant to walk outside the bar, which he did. Placed him on the police car and frisked him for weapons. I examined these tin foils which contained a brown powder which I believed to be heroin.

Q When you got outside of the police car, did you examine any other pockets of the coat?

A I did. I examined the contents which was inside of the left, front pocket where I retrieved the balloons and paraphernalia.

Q This pocket where you retrieved the balloons and the Public Service bills, was that the top pocket or bottom pocket?

A Bottom, left pocket, sir. I believe there was four pockets on the jacket, two on the bottom and two on the top. Upon further examination of the coat, I found, in the top, left pocket, several dollars, about forty dollars in U. S. currency, and wrapped around the driver's license. The driver's

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license was the defendant's driver's license. Sawyer Lewis had his picture on it.

Q Officer, what did you do after that?

A Upon recognizing the powder as what I believed to be heroin, I advised the defendant he was under arrest for possession of heroin, handcuffed him, frisked him and searched him for any additional contraband or weapons and placed him in the rear of my police unit.

Q What did you do after that?

A We transported him to the Narcotic's Office.

Q Did you maintain the balloons with the heroin in your possession?

A Yes, sir. They remained in my possession until I turned them over as evidence in the Narcotic's Office.

Q Who did you turn them over to in the Narcotic's Office?

A Detective James Lewis in the Narcotic's Division.

Q Did you do anything with the evidence when you turned it over to them?

A We initialled and dated every piece of evidence. I properly tagged the coat and the money and the Public Service bill. I tagged all of that and placed it into evidence.

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Q I want to show you what's been marked for identification as S-1. You recognize this?

A Yes, I do.

Q What is that?

A That's the envelope which Officer Jimmy Lewis placed our recovered evidence. Officer Lewis filled out all of this form. We don't fill out anything here. And it was sealed by Officer Lewis.

Q Sealed in your presence?

A Yes, sir.

Q I will show you S-2. You recognize S-2?

A Oh, yes, sir.

Q What is S-2?

A This is the pink balloon which I mentioned awhile ago. And this is each piece of evidence which was in this pink balloon. That's my initials "J. P. M." And the date.

Q Are Jimmy Lewis's initials on there?

A Yes, sir. "J. L."

Q I show you S-3. You recognize S-3?

A Yes, sir. This is the orange balloon which I previously mentioned and the contents in that orange balloon at the time. This orange balloon had been ripped open, and

there were several other pieces of tin foil wrapped up. My initials and the date.

Q Whose initials are on there?

A Okay. "J. F. M." Those are my initials. "J. L." James Lewis. And"W. F. K." is my partner, Warren Keller.

Q S-4, you recognize that?

A These are the five individual pieces of tin foil which I found in the coat.

Q Be more specific?

A In the pocket of the coat.

Q What pocket?

A Left, lower pocket.

Q In your presence, Officer Lewis placed S-2, 3 and 4 inside of S-1 and sealed it?

A Yes, sir, he did.

Q I show you what's previously marked as S-5. You recognize S-5?

A Yes, sir, I do. This is the coat which I previously mentioned. You see it has four pockets. It was in this pocket that I observed the defendant place something inside of the pocket quickly.

Q How close were you to him when you saw him do this? Were you in pursuit of him at this time?

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A Yes, sir. I was following him directly into the barroom. I was about as close from here to the microphone. About ten or twelve feet.

Q What did you do with the coat after?

A After he placed something in it, he picked it up and put it in the booth.

Q How far was the booth?

A Two feet.

Q Was he standing pretty close to the booth where he threw the coat?

A Yes, sir.

Q Were there any other clothes in the booth in that area?

A No, sir, no clothes at all.

Q I will show you S-6. You recognize S-6?

A Yes, sir. This is the other property that I found in that same pocket, that lower, left pocket, thirty-four cents in change, Public Service bill and receipt in this envelope and a set of keys, sir.

Q Anybody's name on that Public Service bill?

A Yes, sir. Sawyer J. Lewis. At the address of 522 South Lopez Street.

Q I show you S-7. You recognize S-7?

A Yes, sir, forty dollars in U. S. currency, sir, which I found wrapped around that Louisiana Driver's License.

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Q Where did you find S-7?

A In the top, left pocket.

Q Where were you physically when you found S-7?

A Out by my police car.

Q Did you see the person that you saw throw the coat down in Court and put something in it?

A Yes, sir, I do.

Q Would you point him out?

A The defendant before the bar.

BY MR. NOREA:

Let the record reflect: He pointed out Sawyer Lewis.

DIRECT EXAMINATION BY MR. NOREA:

Q Officer, did these events occur in Orleans Parish?

A Yes.

Q Were there other patrons there in the bar? Or, do you know?

A In the bar, but not by the booth.

Q Can you estimate how many people were by the bar area?

A At least ten.

Q Did these events occur in Orleans Parish?

A Yes, they did.

BY MR. NOREA:

Tender the witness.

CROSS EXAMINATION

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BY MR. MOULEDOUX:

Q Officer Marie, how many people do you think, you say, were in the bar?

A I would say at least ten, sir. The bar was lined up with customers.

Q And how many were on the outside when you first arrived?

A Several, maybe five or six people standing on the outside of the barroom.

Q Had you had any dealings with the defendant before?

A No, sir, never seen him before.

Q This area of New Orleans where the Streamline Tavern is located, where is that?

A It's in what's considered the Girt Town area of town.

Q Carrolton, Earhart, Washington, Jefferson Davis area?

A Yes, sir.

Q Do you work that area exclusively?

A No, sir. I worked the entire city. I use to work the Second District prior to being in the Felony Action Squad and worked in the Girt Town area.

Q How far behind you was Officer Keller when you entered this bar or the Tavern?

A When I entered the Tavern, he might have been

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about four or five feet behind me running in the bar with me. We wanted to make sure. You know, we work so much together, so often, he usually knows my moves. When I broke and ran toward the barroom, he just stopped the car and followed me.

Q He had to go around the car?

A Yes, sir.

Q What was the reputation as far as you're concerned as a policeman of the narcotic activity of this area.

A It varies. Let's say the Streamline Bar, for instance, one month there may be a heavy narcotic activity around the Streamline Bar. Then, it might move around the block, Pine Street, Olive Street. It never stays in one block because that's the way the narcotic's people operate.

Q The Girt Town area is known as the narcotic area?

A You can classify the city of New Orleans known for narcotics, sir.

Q When Sawyer Lewis went for the jacket, did you see anything in his hands?

A No, sir. What was in his hands was concealed from my view. And I saw him place something inside of the coat.

Q Now, which pocket did he place this something in?

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A It was in the left, front, lower pocket, sir.

Q Left, front, lower pocket. Now, you examined the left, front, lower pocket. What did you find in that pocket?

A The first thing that I picked up was the balloons. And I found, in my hand, also, when I removed it, I found loose pieces of tin foil folded up. At that point, I immediately held onto the coat, looked over at the defendant. He was leaning against the jukebox looking toward me with casual, nervous type glances. I motioned to my partner, "Let's get him."

Q Officer, have you previously testified at the preliminary hearing in that matter?

A Yes, I did, sir. Excuse me, sir, I'm not sure if I testified at the preliminary hearing. I was there. I believe Officer Keller testified that day.

CROSS EXAMINATION BY MR. MOULEDOUX:

Q Officer Marie, I would like you to read over the contents of this document there?

BY THE COURT:

Let's first find out, after reading, whether or not you recall testifying. Read the first page. (Witness complies.) Do you now recall testifying at the

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preliminary examination, Officer?

BY THE WITNESS:

Yes, sir.

CROSS EXAMINATION BY MR. MOUDELOUX:

Q Now, Officer Marie, I want to ask you a few questions about the contents of this document. Does this reflect what happened at the preliminary hearing?

A Basically. I see I had a little mistake there. I must have said at the preliminary hearing which was a right, front pocket. But, it was the left, front pocket, sir. I'm quite sure on that.

Q I ask you here in the preliminary hearing, is it not true, from you having refreshed your memory, that you said that the--"I followed the defendant into the barroom and observed him run to the right side of the barroom, reach in and grab a coat which was in a booth and place something inside of the left, front coat pocket of that coat and discard it into the booth and walk away." Is that what you said that night?

A Yes, sir. That's what I testified to this morning.

Q "I quickly looked around the barroom. I didn't see the man I was looking for originally.

I walked over to the coat knowing no one had been around the coat other than the defendant. Quickly looked into the right, front pocket, figuring that the defendant in my opinion at that time, that the defendant may have threw a gun in there." Is that what you further testified to?

A That's what I testified to, sir.

Q Further upon: "I examined the contents of the right, front pocket"--no, excuse me--"I examined the contents of the pocket. And found that it contained two balloons." Now, from what you're testifying today and what you testified at that time, you're saying in this that you found something in the right, front pocket; is that correct, sir?

A I found it in the left, front pocket, sir. At that point, I just made a mistake in my testimony.

Q Could you be making a mistake today?

A No, I'm not making a mistake today, sir. I prepared for this case.

Q When was the date of that arrest?

A Twenty-ninth of December.

Q What was the date of the preliminary hearing?

A Possibly two or three days later.

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BY THE COURT:

You have the document, Mr. Mouledoux?

BY MR. MOULEDOUX:

Yes, Your Honor.

BY THE COURT:

What was the date of the document?

BY MR. MOULEDOUX:

January 4th.

CROSS EXAMINATION BY MR. MOULEDOUX:

Q Was the preliminary hearing on January 4 as stated on the affidavit of the reporter?

A Yes.

Q On January 4th, you said that you found this narcotics in the right, front pocket. And today you say you found everything in the left, front pocket except for the money that was in the upper pocket; is that correct, sir?

A Right. Yes, sir.

Q At anytime did you see anything in Mr. Lewis's hands other than the jacket itself?

A No, sir. I couldn't tell what he placed into the pocket.

Q Another question was asked you by the District Attorney at this hearing, sir. Question: "In the pocket where you observed Mr. Lewis place something, was there any

other paraphernalia or anything else in that particular pocket?" Answer to that statement, you answered: "In that pocket there was a small amount of change, about thirty-five cents, a set of keys and the NOPSI bill in that one pocket, sir."

A Right. Yes, sir.

Q There was no narcotics in that pocket?

A Yes, sir, alongwith that. My main concern, sir, was for the narcotics. It wasn't for the defendant's light bill.

BY MR. MOULEDOUX:

No further questions.

RE-DIRECT EXAMINATION

BY MR. NOREA:

Q This coat here, did you find all of the articles here in this coat here?

A Yes, sir.

Q Is this the coat the defendant had in his hand?

A Yes, sir.

BY MR. NOREA:

No further questions.

BY THE COURT:

Recross?

BY MR. MOULEDOUX:

Nothing.

BY THE COURT:

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Officer, you're excused. Do not discuss your testimony with anyone. Remain outside.

BY MR. NOREA:

I call Frank Ben.

Judge, while Officer Ben is coming in, I would like to offer and introduce as evidence that previously marked S-1 through 7.

BY THE COURT:

Offer them by number.

BY MR. NOREA:

S-1, the brown envelope.

BY THE COURT:

Any objection to S-1, Mr. Mouledoux?

BY MR. MOULEDOUX:

Yes, sir.

BY MR. NOREA:

S-2, 3 and 4.

BY THE COURT:

I'm going to sustain the objection as to S-1.

BY MR. NOREA:

S-2, 3 and 4 contained in S-1.

BY MR. MOULEDOUX:

Objection to those too, Your Honor.

BY THE COURT:

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As to S-2, the objection is overruled. S-2 is admitted into evidence and may be viewed by the jury. As to S-3, the objection is overruled. It may be admitted into evidence and may likewise be viewed by the jury. S-4, the objection is overruled. S-4 is admitted into evidence and may be viewed by the jury.

BY MR. NOREA:

S-5.

BY MR. MOULEDOUX:

General objection.

BY THE COURT:

Overruled. S-5 is admitted into evidence and may be viewed by the jury also.

Counsel, pause at this time and start handing the exhibits to the jury.

BY MR. MOULEDOUX:

At this time, I would like to note my objection to the introduction of this evidence.

BY MR. NOREA:

Judge, S-6--

BY THE COURT:

Hand the jacket to Mr. Rogers.

BY MR. NOREA:

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S-6 which is marked in globo, it's thirty-four cents, keys, two Public Service bills and an envelope, Public Service envelope.

BY THE COURT:

Same objection?

BY MR. MOULEDOUX:

Yes, Your Honor.

BY THE COURT:

Overruled. S-6 is admitted into evidence. Ladies and gentlemen of the jury, keep S-6 together. It's one, two, three--

BY MR. NOREA:

I will put them all in this envelope.

BY THE COURT:

All right.

BY MR. NOREA:

Judge, S-7, which is forty dollars and Driver's License.

BY THE COURT:

Same objection:

BY MR. MOULEDOUX:

Yes, Your Honor.

BY THE COURT:

Same ruling. S-7 is admitted into evidence and may be viewed by the jury.

Mr. Ben, have a seat. I want the jury to

have an opportunity to view the evidence. (At which time the jury views the evidence.)

FRANK BEN, who, having been duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. NOREA:

Q State your name, please?

A Frank T. Ben.

Q How are you employed?

A New Orleans Police Department, sir.

Q How long have you been employed in that capacity?

A Approximately twelve years.

Q Officer, what division are you presently assigned?

A I'm presently assigned to the Urban Squad Narcotic Task Force.

BY MR. NOREA:

Your Honor, at this time, the State would attempt to qualify Officer Ben as an expert in the field of track marks. Identifying track marks, habits of narcotic users, particularly heroin, and narcotic paraphernalia, particularly heroin.

BY THE COURT:

All right.

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DIRECT EXAMINATION BY MR. NOREA:

Q Sir, did you ever work undercover?

A Yes, sir.

Q Tell the ladies and gentlemen of the jury the extent of your undercover work?

A Yes, sir. I worked undercover in the Metropolitan area in 1966 through 1970. During that period of time I was engaged by the Police Department and Bureau of Narcotics and Dangerous Drugs to enter into the drug community of this city and attempt to make purchases of elicit drugs, heroin, barbituates, amphetamine and marijuana. During that period of time, I made perhaps six hundred cases.

Q What years did this entail?

A '66 through '70, sir.

Q Have you ever bought heroin on the street?

A Yes, sir, I have.

Q Have you ever observed heroin addicts use heroin?

A Yes, sir, I have.

Q Have you ever observed the results on their arms?

BY MR. MOULEDOUX:

I object to this line of questioning on this witness because of the fact that not a word was brought out on this point of this man being a heroin addict

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or user or anything else in connection with this particular case.

BY THE COURT:

Overruled.

BY MR. MOULEDOUX:

Note my objection.

DIRECT EXAMINATION BY MR. NOREA:

Q You ever observe track marks?

A Yes, sir, I have.

Q How many occasions have you observed track marks?

A I see track marks on a daily basis.

Q Have you ever observed someone prepare to shoot-up heroin?

A Yes, sir, I have.

Q How many occasions have you seen this?

A I will say quite a few times.

Q You ever actually seen people shootup heroin?

A Yes, sir.

Q You know how many times you have seen that?

A I would say in excess of two hundred times.

EXAMINATION BY THE COURT:

Q What causes track marks, Officer Ben?

BY THE WITNESS:

A Track marks are caused, Your Honor, by the constant introduction of any foreign object into a vein on the human body.

DIRECT EXAMINATION BY MR. NOREA:

Q Have you ever observed upper echelon dealers preparing heroin to distribute?

A Yes, sir, I have.

Q How many occasions did you observe that?

A I would say better than fifty times, sir.

Q Officer, have you received any special training in narcotics and drug abuse?

A Yes, sir. I received my training first from Sergeant Giarrusso who's now Superintendant of Police; Major Koch, who's the man in charge of the New Orleans Police Department Crime Lab. I also attended the Bureau of Narcotics and Dangerous Drugs School for their agents, which is a Federal Arm of Drug Enforcement here in the United States. More importantly, I have been trained by the people, the addicts and the distributors, themselves, while in the undercover capacity on the streets of New Orleans.

Q Officer, have you ever been qualified in these fields before?

A Yes, I have.

Q Where have you been qualified in these particular fields?

A All sections of Criminal Court in the Parish of Orleans and all sections of the United States Courts, the Eastern District. I

have been qualified in the states of New York, New Jersey, more recently in the state of Missouri.

Q Have you ever been refused qualifications in any Court?

A No, sir, I have not.

BY MR. NOREA:

Tender the witness on the predicate.

BY MR. MOULEDOUX:

No questions.

EXAMINATION BY THE COURT:

Q Officer, have you seen addicts do-up by injecting heroin in their arms?

BY THE WITNESS:

A Yes, I have.

Q Have you spoken with addicts after they do-up?

A Yes, sir.

Q Addicts point out to you needle marks or track marks which occur as a result of needle marks in their veins or their arms?

BY THE WITNESS:

A I have seen it, sir, more or less directed to the point of injection by addicts in the past.

Q Have you seen heroin packaged for distribution?

A I have seen it packaged in several different ways in the past eight years.

Q You have seen it packaged in tin foil packages?

A Yes, sir. More recently in the past three and a half years.

Q How about gelatin capsules?

A They go back to the period between '66 and '67. The papers, which was the cellophane envelope, peanut bag, were more prevalent in the later part of '67 and '70. That gave way to the balloon for a short period of time, and then the tin foil.

Q What is a bundle?

A A bundle is twenty-five dose units of heroin packaged together and sold usually wholesale

Q When you say, "a dose," you mean something commonly called a paper?

A Yes, sir.

EXAMINATION BY THE COURT:

Q Something packaged in a tin foil package today?

BY THE WITNESS:

A Yes, sir, approximately three of the double zero capsules were sold sometime ago. Three of those would go to one paper. That would be the approximate equivalent.

Q How is the bundle usually packaged?

A Presently a bundle is packaged into the tin foil packets placed into another carrier, a matchbox, piece of cellophane, something.

BY THE COURT:

It being submitted, I find the witness, Frank Ben, is an expert in the field of narcotics. And as an expert, I will permit him to give an opinion to the jury which may be opinion testimony in the field in which he is found to be an expert.

DIRECT EXAMINATION BY MR. NOREA:

Q Officer, what are track marks?

BY THE COURT:

He just answered that.

BY MR. NOREA:

I would like him to examine the defendant to see if the defendant has any track marks.

BY MR. MOULEDOUX:

I object to that.

BY THE COURT:

Overruled.

BY MR. MOULEDOUX:

Note my objection.

BY THE COURT:

Remove your jacket, Mr. Lewis. Stand up, give Mr. Ben an opportunity to view both arms. (Defendant complies.)

Thank you, Mr. Lewis. Remain at the Counsel table.

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Mr. Ben have a seat at the witness table.

DIRECT EXAMINATION BY MR. NOREA:

Q Officer, what was the result of your finding?

A No active hypodermic needle marks on the defendant.

Q How about inactive?

A Only one questionable section on his arm.

Q Sir, in your professional opinion, the defendant is not a narcotic--

BY THE COURT:

No. Do not ask the question.

What is your professional opinion as to whether or not the defendant is addicted to the use of heroin?

BY THE WITNESS:

A At this time, I would say that the man is definitely not addicted to heroin.

BY MR. MOULEDOUX:

I would like to further note my objection to this whole line of questioning and note my objection for the record.

BY THE COURT:

Overruled.

DIRECT EXAMINATION BY MR. NOREA:

Q Officer, what would you say if I told you that the defendant was found to be in possession of S-2, 3 and 4? I would like you to look

at those carefully.

BY THE COURT:

I don't think that's permissible. We will have a recess. Remain seated, ladies and gentlemen. Have a seat. We will recess and speak in chambers.

COURT RECONVENES:

BY THE COURT:

Let's proceed.

DIRECT EXAMINATION BY MR. NOREA:

Q Officer, let me pose a hypothetical question to you: A person with no track marks--

BY MR. MOULEDOUX:

I object.

BY THE COURT:

I sustain that objection.

BY MR. NOREA:

Your Honor, it's a hypothetical question.

BY THE COURT:

I feel it goes to an issue which the jury must decide and will not permit an expert to testify as to that particular question.

DIRECT EXAMINATION BY MR. NOREA:

Q This hypothet: If one is in possession of forty-nine individual dosage units of heroin, would that be any individual

conclusion you draw from that?

BY MR. MOULEDOUX:

I object to that.

BY THE COURT:

Sustained.

DIRECT EXAMINATION BY MR. NOREA:

Q What's the normal amount of heroin that a heroin addict would have in their possession at one time?

A Only the quantity he is going to use at that particular point. If he is going to cook over two units, he will have two units in his possession. It's very rare that he will have more than that.

Q What is the cooker?

A A bottlecap used to dilute the heroin prior to injection.

Q Normally, how much heroin is put in a cooker prior to injection?

A That depends on the addict.

Q What's the normal amount?

A It's three things; that's three dose units.

Q Let me ask you something: What's the street value of a dosage unit of heroin, the retail value?

A The retail value now is between twelve and fifteen dollars.

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Q That's for each individual piece of paper?

A That's correct.

Q How is heroin sold in the wholesale?

A Wholesale right now fluctuates between a hundred and fifty, in some places downtown as high as two-o-five for a bundle.

Q How much is the bundle you have?

A Twenty-five dose units.

Q How is twenty-five dose units normally packaged in the bundle form?

A Sometimes it's heat sealed in a small cellophane envelope. I have seen it put in matchboxes, seen it wrapped in the cellophane from the cigarette packs tied off at the top. Anywhere they can package it, they will put it.

Q People that transport heroin in bundles, twenty-five individual dosage units, how would you categorize their participation in the drug market, wholesale or retail?

A A man dealing primarily in bundles for the most part will be a wholesaler. The man that would be at the street level with this quantity would usually be one of two things, a person that's addicted himself, what is called a street level addict distributor or have a pure distributor

street level.

Q What's the difference between a street level addict distributor and a pure distributor?

A Excuse me?

Q What's the difference between an addict street level distributor and pure street level distributor?

A An addict distributor is a man that usually with a habit himself. He has a habit, and the only way that he can support that habit is by coming onto the streets of our city and selling heroin to support himself on the drug. A pure distributor is a man that is there for the monetary gain. He doesn't use heroin. He only frequents the area where he knows he can sell it. And he only gets the profit off of it. He is not doing it because he is sick. He is not doing it because his body is going to crave it. He is doing it as a living.

Q In the marketing chain of heroin, what's the chain immediately above the street level distributor? Does that have any particular name?

A Yes, sir.

Q What is that?

A That would be your wholesaler.

Q In what quantities is wholesale distributors of

drugs dealt with?

A They have two levels of wholesale. They have the wholeseler who deals strictly in bundles. That is the stuff already diluted and ready for street use.

Q What form is that; already diluted and ready for street use?

A That is packaged in the bundle, twenty-five dosage units. In other words, you have the man who's going to deal in spoons, regular table spoons, of heroin or teaspoons of heroin and ounces, which is called pieces. This stuff is usually a little more potent than street level. It can be cut one time. By "cut" I mean diluted one time or more depending on the strength of that particular wholesale person.

Q When heroin gets down to the street level, to be sold on the street level, what form is that; how is it packaged?

A By then, it's in the tin foil packages.

Q Twenty-five of those tin foil packets are a bundle; is that correct?

A Yes, sir.

Q And once again, what's the street value of a bundle right now?

A The street value is right around three hundred

dollars if you're going at twelve dollars a bag.

Q For someone in possession of fifty papers of heroin--

BY THE COURT:

No. That's not going to be permitted.

DIRECT EXAMINATION BY MR. NOREA:

Q What's the most an addict will maintain in his possession for his own personal use?

A Just about what he is going to cook with. And he is usually going with it directly from the person that he has scored with to a cooker where he can inject his drugs.

Q Why doesn't a person who is going to keep heroin for their own personal use keep more than what he is going to go to the cooker with?

A For three reasons. Number one: If he has the drugs he stands a very good chance of being jacked for it.

Q What is "jacked"?

A That's robbed by another addict who will put a gun on him and take his drugs. Number two: He has to fear police informants who might know he has the drugs and call the police and tell the police that he has it. And third: If he has the drugs and stock piles it and he is not using it himself, the other

distributors are going to be very very leary of him and decide he is most likely either a police or informant.

BY MR. NOREA:

No further questions.

BY MR. MOULEDOUX:

No questions.

BY THE COURT:

All right, Officer. Thank you. Step down and remain outside.

Any further need of this witness?

BY MR. NOREA:

No, sir.

BY THE COURT:

(At the conclusion of lunch recess.)

Mr. Norea, ready to proceed?

BY MR. NOREA:

At this time the State rests.

BY THE COURT:

Evidence for Defense?

BY MR. MOULEDOUX:

At the time, the Defense rests.

* * * *

(No objections noted by Counsel for Defense during closing argument or to the jury charge.)

* * * *

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C E R T I F I C A T E

I, ELLIS M. GILL, Official Court Reporter, Criminal District Court, Parish of Orleans, State of Louisiana, Section "A", case entitled and numbered State of Louisiana versus Sawyer Lewis, case number 257-998, hereby certify that the foregoing pages of transcript is a true and correct copy of my shorthand notes done to the best of my ability and understanding.

Ellis M. Gill

Ellis M. Gill
Official Court Reporter

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 198

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SUPREME COURT, U.S.

NO. 79-6514

SAWYER LEWIS,

Petitioner,

V.

THE LOUISIANA STATE PENITENTIARY,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the rules of this Court, petitioner, Sawyer Lewis, asks leave to file the attached Petition for a Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this motion is attached hereto.

Dated April 21st, 1980.

Sawyer Lewis
SAWYER LEWIS, Petitioner

GARON, BRENER & McNEELY
1304 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
(504) 581-9322

By
JACQUES F. BEZOU, Attorney for
Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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Petitioner

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THE LOUISIANA STATE PENITENTIARY,

Respondent

AFFIDAVIT IN SUPPORT OF PETITION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Sawyer LEWIS, first being duly sworn according to law, depose and say that I am the petitioner in the above entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1.

Because of my poverty, I am unable to pay the cost of said cause.

2.

I am unable to give security for the same.

3.

I believe that I am entitled to the redress I seek in said cause.

4.

This review is sought in good faith.

5.

The nature of said cause is briefly stated as follows: I was denied reasonably effective assistance of retained

counsel in the defense of a matter which ultimately resulted in my receiving life imprisonment.

Sawyer Lewis

SAWYER LEWIS

Sworn to and subscribed before me

this 21st day of April, 1980.

JACQUES F. BEZOU, NOTARY PUBLIC

ORIGINAL COPY

IN THE

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OCTOBER TERM, 198

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SAWYER LEWIS,

Petitioner

V.

THE LOUISIANA STATE PENITENTIARY,

Respondent

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 198

No. 79-6514

SAWYER LEWIS,

Petitioner

V.

THE LOUISIANA STATE PENITENTIARY,

Respondent

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Sawyer Lewis, appearing herein in forma pauperis, respectfully submits this supplemental petition for a writ of certiorari and prays that writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1980.

Petitioner merely wishes to bring to the Court's attention the recent decision of United States v. Brown, 27 Crl 2081 (D.C. Cir. 1980), which it is felt is particularly pertinent to the issues to be considered herein.

CONCLUSION

Petitioner prays that this Honorable Court take into consideration the aforementioned decision in deciding whether or not to grant the writ prayed for herein.

Respectfully submitted,

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NO 79-6514

SAWYER LEWIS,
Petitioner

Vs.

THE LOUISIANA STATE PENITENTIARY,
Respondent

Response In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit.

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF
THE STATE OF LOUISIANA

HARRY F. CONNICK,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-6514

SAWYER LEWIS,
Petitioner

Vs.

THE LOUISIANA STATE PENITENTIARY,
Respondent

Response In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit.

QUESTION PRESENTED

WHETHER THE UNITED STATES DISTRICT COURT ERRED IN DENYING APPELLANT HABEAS CORPUS RELIEF, FINDING THAT APPELLANT HAD RECEIVED EFFECTIVE ASSISTANCE OF RETAINED COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

Sawyer Lewis is a State prisoner presently serving a life sentence, without benefit of parole, after having been convicted by a jury on February 28, 1977, of possession of heroin with the intent to distribute, in violation of La.R.S. 40:966. At trial of this matter, appellant was represented by retained counsel, George Mouledoux, who had been a practicing member of the Louisiana State Bar for approximately fourteen years at the time of trial.

Petitioner chose not to appeal his conviction and sentence to the Supreme Court of Louisiana. Rather, he filed a petition for a Writ of Habeas Corpus in the State trial court alleging ineffective assistance of counsel. After conducting an evidentiary hearing, the State trial judge, the Honorable Charles R. Ward, denied petitioner relief. The Louisiana Supreme Court denied Lewis's application for Writs of Certiorari, Mandamus and Prohibition. State of Louisiana v. Sawyer Lewis, 352 So.2d 236 (La.1977).

On December 1, 1977, appellant filed a petition for Writ of Habeas Corpus with the United States District Court for the Eastern District of Louisiana numbered 77-3477, Section E. United States Magistrate Wicker, on November 30, 1978, recommended that the petition of Sawyer Lewis for a Writ of Habeas Corpus be dismissed. United States District Court Judge Fred J. Cassibry after carefully considering the petition, the record, including the State Court record, the law applicable to this case, and the Magistrate's Report and Recommendation, dismissed appellant's petition on December 22, 1978. Judgment was accordingly entered on December 26, 1978.

In an unpublished opinion dated February 4, 1980, the United States Court of Appeals for the Fifth Circuit affirmed the District Court decision denying the writ. Petitioner now comes before this Honorable Court seeking issuance of a Writ of Certiorari to review the Fifth Circuit decision.

STATEMENT OF THE FACTS

The record reflects that shortly after petitioner was arrested a preliminary hearing was conducted. The testimony adduced at that hearing showed that on December 29, 1976, at approximately 6:30 p.m., Officers Warren Keller and John Marie, Jr., of the New Orleans Felony Action Squad, who were making a routine wanted check for a suspected armed robber by the name of Lincoln Lewis (no relation) approached the Streamline Tavern in the 3200 block of Fern Street, New Orleans, Louisiana. As they alighted from their unmarked car, they saw petitioner enter the tavern in a "hurried" manner. Officer Marie followed Lewis into the bar, observed him run to the right side of the room, reach into a booth, grab a jacket, place something inside the "left" front pocket, "discard" and abandon the jacket into the booth, and walk away. Officer Marie then walked over to the jacket and looked into the "right" front pocket "figuring defendant might have threw (sic) a gun in there. It's a heavily narcotics traffic bar, many gun arrests have been made there." Although no gun was found, Marie testified that he found two balloons: one tied in a knot and one ripped open on the side. Further search of the jacket revealed loose tin foil packets along with a Public Service bill, loose keys and some change. (Transcript, Preliminary Hearing, pp. 2-17).

After Officer Marie retrieved the jacket and informed his partner of its contents, petitioner, who was now standing next to the jukebox several feet away, was instructed to walk outside. Once outside, Lewis was frisked for weapons. Officer Marie, after examining the remaining jacket pockets and the contents of the tin foil packets containing a brown powder which

he believed to be heroin, placed petitioner under arrest. (Tran. Preliminary Hearing, pp. 2-18).

The record reflects that although counsel did not file a motion to suppress this evidence, he did object to its introduction during the course of the trial. Tr. 46-49.

ARGUMENT

Both the United States District Court and the Court of Appeals for the Fifth Circuit properly found that federal habeas corpus relief is not available to the appellant since he received effective assistance of retained counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. The instant record reflects that:

1) Trial counsel for appellant, Mr. Mouledoux, is a member of the Bar of the State of Louisiana and had been engaged as an attorney for approximately fourteen years at the time of appellant's trial;

2) Mr. Mouledoux conferred with appellant at the Parish Prison at least twice and perhaps four times prior to trial regarding trial strategy;

3) Mr. Mouledoux read the transcript of appellant's preliminary hearing. (Mr. Mouledoux did not represent appellant at the preliminary hearing.);

4) Mr. Mouledoux was aware of the penalty for the crime charged;

5) Mr. Mouledoux thoroughly examined the District Attorney's file prior to trial;

6) Mr. Mouledoux again discussed the case thoroughly with appellant the morning of trial;

7) Mr. Mouledoux skillfully and vigorously cross-examined the State's witnesses;

8) Mr. Mouledoux discussed with appellant whether appellant should testify in his own behalf. Appellant, after such consultation, decided that he should not testify;

9) Mr. Mouledoux made numerous and appropriate objections during the course of the trial;

10) Mr. Mouledoux had an investigator aiding him in the defense of appellant;

11) Mr. Mouledoux filed a Motion For New Trial on behalf of the appellant; and

12) Mr. Mouledoux filed a Motion For Appeal on behalf of appellant.

The standard for judging the effectiveness of retained counsel is set forth in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975)(en banc):

> "In sum, whenever the actions of retained counsel operate to deprive the trial of fundamental fairness then the Fourteenth Amendment due process has been violated notwithstanding any kind of specific involvement by a particular state official. If

> a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown."

Thus, to establish a denial of the Sixth Amendment right to counsel where defendant retained his own counsel requires a showing of either (1) that retained counsel's performance was "so grossly deficient as to render the proceedings fundamentally unfair" or (2) that retained counsel's incompetence is so apparent that a reasonably attentive official of the state should have been aware of it and could have corrected it. Fitzgerald v. Estelle, supra; Howard v. Henderson, 519 F.2d 1176 (5th Cir. 1975); United States v. Childs, 571 F.2d 315 (5th Cir. 1978).

However, the right to effective assistance of counsel under the Sixth and Fourteenth Amendments does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Howard v. Henderson, supra; Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), citing McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied 268 U.S. 877, 82 S.Ct. 121 (1961).

Mr. Mouledoux testified that prior to trial he met with appellant at the Parish Prison at least twice and perhaps four times in order to discuss the case. (See Exhibit B of Record on Appeal, 79-1646, hereinafter referred to as "Tr." p. 27). He further testified that he had studied the transcript of the

preliminary hearing. Tr. 28. He was aware of the penalty the appellant faced for the crime charged. Tr. 28. Moreover, counsel testified that he was fully familiar with the District Attorney's file. Tr. 46. This fact was corroborated by the prosecuting District Attorney Nick Noriea. Tr. 46. Moreover, the United States Magistrate in its Report and Recommendation, adopted by the United States District Court found that: (Tr. 44)

> "The record reflects (and the testimony of the prosecuting attorney and other witnesses at petitioner's state court hearing substantiate, Tr. 61-63), that counsel engaged in skillful and vigorous cross-examination of the State's witnesses and made numerous and appropriate objections during the course of the trial. Additionally counsel testified that it was petitioner and not counsel who decided that petitioner would not testify in his own behalf at the trial of this matter."

The United States District Court concluded that:

> "There is nothing in the record to suggest that defendant had a trial so fundamentally unfair as to violate his rights to due process under the Fourteenth Amendment."

Appellant in his petition to the trial court alleged two specific reasons why retained counsel was ineffective. First, appellant alleged that retained trial counsel was intoxicated. This allegation has been totally abandoned. Second, appellant alleged that trial counsel's failure to file a motion to suppress the evidence denied appellant "a substantial defense".

At the hearing on petitioner's writ of habeas corpus, counsel testified that the District Attorney's Office had opened its file to him and after a review of that file and based upon discussions with his client, he did not think any pretrial motions were warranted. Tr. 29, 46. He also testified that based upon certain portions of the transcript of the preliminary hearing alone, he did not think the police had probable cause to follow Lewis into the bar, but did have a right to go into the bar and search the coat because it had been abandoned. Tr. 37-39. See State v.Ryan, 358 So.2d 1274 (La.1978). Although counsel prepared a motion to suppress, he decided not to file it after consulting with Lewis who told him he didn't go near the coat or put anything in it and that it was the police who walked over to the coat and put something into his pocket. This was a completely different story from that which came out at the preliminary hearing and in counsel's opinion, based upon a review of the District Attorney's file, a review of the preliminary hearing, and discussions with his client, it would have been a breach of his professional responsibilities to file a motion so frivolous and misleading. Tr. 39-43.

Mere errors of judgment or a mistaken choice of strategy by an attorney is insufficient to support a finding of lack of effective assistance of counsel in a constitutional sense. Coco v. United States, 569 F.2d 367 (5th Cir. 1978); United States v. Meyer, 417 F.2d 1020 (8th Cir. 1969); Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975). The Fifth Circuit correctly held in the present case that if counsel erred in failing to file the motion, that that error would not compel a finding of fundamental unfairness.

However, assuming arguendo that petitioner's counsel was less than reasonably effective, both the United States District Court and the Fifth Circuit ruled that "the record fails to demonstrate that petitioner's counsel was so blatantly ineffective that the Louisiana trial court or any one of its responsible officials knew or should have known that Lewis was receiving inadequate representation." Loftis v. Estelle, supra; United States v. Graza, 563 F.2d 1164 (5th Cir. 1977); Alverez v. Wainwright, 522 F.2d 100 (5th Cir. 1975).

Finally, in a post-application memorandum to this Honorable Court, counsel for petitioner cites the unpublished decision of United States v. Brown, 27 Cr.L. 2081 (D.C. Cir. 1980), as allegedly being instructive to this Court and relevant to its decision in this case. The Brown case, however, arises from a motion for new trial and deals with an interpretation of the "cause" exception of F.R.Crim.Proc. 12, which provides that ordinarily a failure to make a suppression motion before trial constitutes waiver. The court held that ineffective assistance of counsel in that regard could, under some circumstances, fulfill the "cause" prerequisite so that a defendant could raise a suppression motion directly by way of a motion for a new trial. Brown thus has limited relevance to the instant case. First, unlike the instant case, it involves direct attack of a federal conviction, and not collateral federal habeas attack upon a state conviction. As such, the issues involved and standards to be applied are totally different.

Second, as that court stated, "Rather than address the separate question of ineffective assistance of counsel, we consider whether Brown may raise his suppression claim directly."

Brown, supra, at 2082. Brown, then, is not an effective assistance case at all, but a "cause and prejudice" case under F.R. Crim.Proc. 12. Third, unlike the present case, the facts in Brown did not show a clear case of abandonment, and the decision was based largely on those grounds. For these reasons, the Brown case is inapplicable with regard to the decision which must be made by this Honorable Court in the instant case.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the decisions of the District Court and the Fifth Circuit Court of Appeals were correct under the facts of this case and the applicable jurisprudence, and that this Honorable Court should therefore deny the petition.

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